

VERBATIM**RECORD OF TRIAL²**

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

PFC/E-3

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

(Social Security Number)

(Rank)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERAL**COURT-MARTIAL**

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

ON

see below

(Date or Dates of Trial)

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¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)² See inside back cover for instructions as to preparation and arrangement.

1 the time of their alleged compromise. Now the United States must
2 prove for some of the charges that the information is classified,
3 because the government charged in some of the 793 and the 1030 class
4 -- charges that the information was classified; however, information
5 suggesting that documents in general are too highly classified has no
6 bearing on whether or not the charged documents were properly
7 classified.

8 As the government has argued repeatedly, over original
9 classification authorities -- original classification authority has
10 been given to specific individuals via executive order based on their
11 positions; and this specific delegation makes sense given all the
12 information that the OCA has to take into account when classifying a
13 document; and this is why courts defer to OCAs to take into account
14 all this information, including the complex, political, historical,
15 and psychological judgments that they take into account when making
16 their classification determinations.

17 And furthermore, the accused obviously is not an OCA
18 entitled to question classification; otherwise, all holders of
19 classified information could question classification and the whole
20 system would, in effect, fold. Now although the accused was trained
21 to understand the importance of safeguarding information and the
22 significance of the classification markings, he was not trained nor
23 was he ever an OCA; and in the defense's response to the government

1 information can be -- unclassified information can be NDI if it's
2 closely held due to the impact its disclosure to unauthorized
3 individuals can have on the United States or the advantage such
4 actions could give to a foreign nation.

5 Now the defense and the court merely have to look at the
6 government's witness list, as well, which clearly shows that the
7 government intends on producing witnesses to offer testimony on the
8 subject matter of each charged document and that each charged
9 document is, in fact, NDI.

10 The United States has also repeatedly acknowledged that
11 Diaz states that classification in and of itself while evidence of
12 NDI is not definitive, and this is further exemplified again by the
13 charges themselves, where one of the 793 charges is not even of
14 classified information.

15 And finally, Your Honor, in defense's response, the defense
16 contends that specific witnesses will say that charged documents are
17 overclassified. This is again -- this again is irrelevant unless the
18 individuals are OCAs. The government acknowledges that the defense
19 could certainly be able to explore -- could certainly explore whether
20 or not the charged information was actually NDI; however, again, they
21 must do so with the proper witnesses. Therefore, if the defense has
22 witnesses that will say that the charged information is not NDI and
23 can lay a proper foundation for that witness's opinion testimony,

1 then that evidence could be relevant; however, again, a general
2 overclassification argument does not support an argument that the
3 information is not NDI.

4 And for point Number 3, Your Honor, even if the
5 overclassification evidence was relevant, there is no evidence that
6 the accused knew about any of the alleged overclassification problem
7 presented by the defense at the time of the accused's misconduct and,
8 therefore, that it had any impact on the accused's intent. After the
9 fact evidence is irrelevant to a person's intent and state of mind at
10 the -- at the earlier time, so therefore the overclassification
11 evidence would not even raise an issue of ignorance or mistake of
12 fact on the part of the accused in relation to the charged offenses.

13 And as for sentencing, Your Honor, the United States goes
14 back to the -- overclassification evidence does not pertain to the
15 charged information nor is there any evidence that the accused knew
16 of the alleged overclassification problem at the time of the
17 misconduct. Therefore, the information does not assist in the -- in
18 explaining the circumstances surrounding the commission of the
19 offenses or assist in lessening the punishment adjudged. Therefore,
20 Your Honor, it shouldn't be admissible in either the merits portion
21 of the trial or the sentencing portion of the trial.

22 MJ: With respect to the sentencing portion, ----

23 ATC[CPT OVERGAARD]: Yes, ma'am.

1 MJ: ---- what is the government's read -- the government's put
2 in here that evidence of subsequent legislation for subsequent --
3 that was passed on overclassification after the misconduct would not
4 be relevant extenuation and mitigation ----

5 ATC[CPT OVERGAARD]: Yes, ma'am.

6 MJ: ---- and [pause] so tell me once again why not.

7 ATC[CPT OVERGAARD]: The evidence doesn't pertain to the charged
8 information. There's no information that the accused knew of the
9 information at the time of the misconduct; and because it's not
10 relevant to the charges in this case, then it shouldn't be relevant
11 to sentencing either, Your Honor. A general argument of
12 overclassification has nothing to do with whether or not the
13 documents in this case were properly classified or whether or not the
14 documents in this case damaged the United States for sentencing.

15 MJ: [Pause] What would the government's view be for the merits
16 and sentencing with respect to cross-examination of government
17 witnesses whether certain information would be classified if
18 following the procedures of the current law?

19 ATC[CPT OVERGAARD]: The defense could certainly cross-examine
20 the OCA witnesses on whether or not the proper procedures were
21 followed in accordance with the executive order.

22 MJ: No, I understand that. I guess my question is, is if the
23 procedures they followed at the time were changed [pause] ----

1 ATC[CPT OVERGAARD]: Cross-examining the ----

2 MJ: Well, actually, let me stop you there. The -- just as a

3 factual matter, the classification reviews that were done in this

4 particular case, what procedures did they follow?

5 ATC[CPT OVERGAARD]: They followed the procedures of Executive

6 Order 13526 and the relevant classification guides of their

7 organizations, and the determination of classification is made at the

8 time the document was compromised not current -- not at the present

9 time.

10 MJ: Okay.

11 ATC[CPT OVERGAARD]: So the present -- the present

12 classification would only go towards whether or not the courtroom

13 should be closed but not go towards the actual charge.

14 TC[MAJ FEIN]: Your Honor, may the United States have a moment?

15 MJ: Yes.

16 [The trial counsel and the assistant trial counsel conferred.]

17 ATC[CPT OVERGAARD]: Just a correction, it's 13526 in the

18 preceding order, which was 12958, Your Honor.

19 MJ: So just to make sure I'm under -- am I understanding the

20 government to say that the government doesn't have to prove that the

21 evidence was properly classified as part of their burden of proof for

22 the elements charged ----

1 ATC[CPT OVERGAARD]: No, that's not what the government is
2 saying, ma'am.

3 MJ: ---- the offenses charged?

4 ATC[CPT OVERGAARD]: The government will prove that the
5 documents are properly classified with the original classification
6 authority witness, and they will do so by having that witness testify
7 about the classification of the document at the time of its
8 compromise and that the classification was made in accordance with
9 Executive Order 13526 in the preceding executive order, and the
10 government will also have subject matter experts talking about why
11 that -- why the information in those classified documents was
12 national defense information.

13 MJ: [Pause] All right, thank you.

14 ATC[CPT OVERGAARD]: Thank you, ma'am.

15 MJ: Mr. Coombs?

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 Your Honor, the evidence related to overclassification in
18 this case is relevant to two facts in issue. First, it's relevant to
19 whether or not PFC Manning had a reason to believe the information
20 could be used for prohibited purposes under both the 793 offenses and
21 also the 1030 offenses.

22 MJ: How?

1 CDC[MR. COOMBS]: And -- and I'll go right to that; and, second,
2 it's relevant to whether or not the charged information relates to
3 the national defense.

4 So with regards to reason to believe, under both the 793
5 and 1030 offenses, the government's required to establish that PFC
6 Manning had a reason to believe that the classified records,
7 classified memorandum, the videos, the files described for each
8 specification could be used to the injury of the United States or to
9 the advantage of any foreign nation; and looking at the court's
10 instructions, proposed instructions on page 10, "reason to believe"
11 means that the accused knew facts from which he concluded or
12 reasonably should have concluded that the information could be used
13 for prohibited purposes. In considering whether the accused had
14 reason to believe that the information could be used to the injury of
15 the United States or to the advantage of a foreign country, you may
16 consider the nature of the information involved; and in this
17 instance, the nature of the information involved is the classified
18 information for those charges in which the government has alleged
19 classified information was compromised. So in each of those
20 instances, the issue of overclassification relates to the nature of
21 the offense, the nature of the information involved.

1 MJ: That's where I'm having trouble with the how; the fact that
2 there's a general overclassification problem, how does that have any
3 nexus to the information in the specifications charged?

4 CDC [MR. COOMBS]: Right, and this kind of goes back to the
5 problem with the earlier motion that we argued here today. The
6 government is attempting by way of motions *in limine* to ask this
7 court to address issues that are better served during the actual
8 merits phase of the trial, where the court has the benefit of all the
9 testimony in order to make determinations on relevance, so we have
10 proffered in our witness list witnesses who are going to come
11 testify, and we'll use, for example, Colonel Davis with regards to
12 the detainee assessment briefs. He's going to come testify that
13 those -- that information could not be used to the harm of the United
14 States; that it is general information. Well, his determine --
15 granted, he's not an OCA, but the government wants this court to
16 believe that OCAs' determinations are unassailable; they're the de
17 facto determination that no one can question. They only control how
18 we handle the information. They do not control, in this courtroom,
19 whether or not this information could be used to the injury of the
20 United States or to the advantage of a foreign nation.

21 MJ: How is Mr. Davis's opinion that something could or could
22 not be harmful to the United States relevant at all? I mean, what
23 possible -- what's his basis for knowledge for having that opinion?

1 CDC[MR. COOMBS]: As the chief prosecutor for the Guantanamo
2 commissions, he reviewed the detainee assessment briefs on a very
3 frequent basis. As we proffered in -- and also based upon his
4 declaration, he referred to those as "baseball cards." They were
5 essentially used by the prosecutors in his office just for general
6 background information. He will testify that later the United States
7 in 2006 and 2007 released the names of all the detainees, so that's
8 part of the detainee assessment brief, but he'll also testify that
9 for the Combatant Status Review Tribunals and the ARBs that were done
10 that looked at the status of each of these detainees, those were
11 released as well by the government under the Freedom of Information
12 Act; and in those records, they had much, if not all, the information
13 that's contained in the detainee assessment briefs.

14 MJ: I understand that; that's factual testimony. My concern
15 here is the opinion that this doesn't cause damage. What's the
16 relevant expertise to give that opinion?

17 CDC[MR. COOMBS]: Well, you know, under R.C.M. 702, individuals
18 can be experts under specialized knowledge, skill, and training.
19 Colonel Davis has that specialized knowledge, skill, and training in
20 order to see, in this case, how the detainee assessment briefs were
21 used. His determination is from looking at that; that the detainee
22 assessment briefs did not need to be classified and, in fact,
23 information contained in those had already been disclosed.

1 MJ: So now we're getting into second-guessing the OCAs.
2 CDC[MR. COOMBS]: Not second-guessing the OCAs from the standard
3 of how the OCAs in this case still maintain that the information was
4 classified at the time and to the defense's knowledge still maintain
5 that it's classified today, but it goes to the determination of
6 whether or not there was a reason to believe that this information
7 could be used to the harm of the United States or to the advantage of
8 any foreign nation.

9 MJ: So how does the fact that Mr. Davis doesn't believe that
10 this information could be used to the harm of the United States have
11 any bearing on the accused; did he know Mr. Davis at the time?

12 CDC[MR. COOMBS]: No, Your Honor, but when we offer evidence of
13 the accused's belief, and, again, this is asking to decide a case in
14 a pretrial motions hearing that really should be decided as we have
15 evidence that's elicited; but the reasonableness of PFC Manning's
16 belief that the information he selected could not be used to the harm
17 of the United States, then the over -- the problem of
18 overclassification in general and the opinions of other individuals
19 who have expertise dealing with this information then support the
20 reasonableness of PFC Manning's belief at that point and that's where
21 the court in this case could use the problem of overclassification to
22 determine whether or not this information truly is the type of
23 information that could be used to the injury of the United States.

1 MJ: Does the Overclassification Act change anything with
2 respect to the executive order that governs how things are
3 classified?

4 CDC[MR. COOMBS]: The Overclassification Act attempts to rein in
5 a problem that is systemic with the government, and the government
6 here today, one of their arguments is there's no evidence that PFC
7 Manning was aware of the problem of overclassification; that's
8 incredible that that's an argument that's actually being made with a
9 straight face because the problem of overclassification has been a
10 widely reported problem since the '70s in our government. It is not
11 an issue that a 35Fox, an intel analyst, or anyone else who was
12 remotely familiar with this area would not be cognizant of. In fact,
13 the problem of overclassification has been an ongoing debate in issue
14 and this particular act was being debated in 2007, so the issue of
15 overclassification is not a secret; is not something that is
16 problematic; and in this case, if the court considers the evidence of
17 overclassification in order to put the OCA's opinion in context, we,
18 as we proffered in our arguments for the witnesses, for example,
19 Colonel Davis again, he is relevant in order to, yes, impeach the OCA
20 because the OCA has an inherent bias and prejudice in this case to
21 determine not only that the information was properly classified
22 initially but is still classified and to exaggerate the nature of the
23 harm and we under M.R.E. 608(c) should be entitled to present

1 evidence of other individuals who would differ with that opinion;
2 and, again, the OCAs ----

3 MJ: Well how is that true when the government gives the OCA the
4 authority to make that determination?

5 CDC[MR. COOMBS]: The ----

6 MJ: So we can get anybody under the sun in the United States to
7 come in and say, okay, do you agree with the OCA? Do you agree with
8 the OCA?

9 CDC[MR. COOMBS]: Absolutely not, Your Honor. What you can do,
10 though, there's nobody that can come in here under oath, sit on that
11 stand, and be not subject to cross-examination, no one. There's no
12 one's opinion who sits on that stand that is unassailable by the
13 defense.

14 MJ: I agree.

15 CDC[MR. COOMBS]: And so when the OCA gets up there and makes
16 his or her opinion that this information was properly classified, is
17 still classified, and could be expected to cause harm to the United
18 States because it's Secret or could be expected to cause serious harm
19 to the United States because it's Top Secret, that's an opinion. Now
20 that opinion carries weight under law only in how that information is
21 handled. It doesn't carry weight in this courtroom as to whether or
22 not that is a *de facto* determination on is this, in fact, a type of
23 information that could cause damage; or is this the type of

1 information that the accused reasonably should have known could cause
2 damage? That doesn't make the determination in and of itself, and so
3 because of that, we are entitled under M.R.E. 608(c) to cross-examine
4 that witness, even an OCA witness, ----

5 MJ: Uh-huh.

6 CDC[MR. COOMBS]: ---- and one of the ways that we can cross-
7 examine them is through extrinsic evidence; in this case the opinions
8 of Colonel Davis, the opinions of Mr. Hall, Mr. Ganiel. The
9 information in sentencing under Ambassador Galbraith, all of that
10 information would undercut and impeach the opinions of the OCA, also
11 expose an inherent bias because one of the worst kept secrets in our
12 government is the fact that our government not only overclassifies
13 information but classifies it for way too long and holds on to it.
14 It was only recently that the Pentagon Papers were declassified by
15 our government, even though they've been out in the public air for
16 decades.

17 So this issue and the issue of overclassification is a
18 relevant issue for the court to consider when making an overall
19 determination on is this the type of information that PFC Manning
20 reasonably should have known could cause damage to the United States.
21 It's also in a related vein relevant to the issue on 793 on whether
22 or not it is, in fact, national defense information. Under the
23 court's instructions, whether or not it's related to national defense

1 encompasses a query that has two separate questions: (1) was it
2 closely held by the United States Government; and (2) whether
3 disclosure of the information would be potentially damaging to the
4 United States or might be useful to the enemy of the United States.

5 Now the court has indicated in its proposed instructions
6 that the fact finder may consider, quote, whether the information was
7 classified or not in determining whether the information relates to
8 national defense. Obviously in this situation evidence of
9 overclassification bears heavily on this determination. The
10 government's position throughout this litigation and, in fact, even
11 today has been that the fact the document is classified provides the
12 most compelling evidence that the document could, in fact, cause
13 damage to the United States or aid a foreign nation; that's their
14 position; that's been their position almost since day one. And
15 they've made no secret about the method in which they intend to
16 potentially prove that point. They're going to bring in an OCA; have
17 the OCA talk about the fact that, yes, I reviewed the information. I
18 determined it was properly classified at X point at the time that it
19 was compromised. I also reviewed it again and I determined that it's
20 still classified and still should remain classified; and in my
21 determination, this information could cause damage to the United
22 States. The government then will argue that from that the inference
23 that they want you to take is, Your Honor, this information was the

1 type of information both that PFC Manning reasonably should have
2 known could cause damage and is information that's related to the
3 national defense.

4 Well Diaz says, you know, that the OCA determination or the
5 classification determination is not the end all, be all. It's some
6 evidence, but it's not beyond reproach; and in this case, the
7 government wants this court to take this as a *de facto* determination,
8 and such a determination ignores the elephant in the room, and the
9 elephant in the room in this case is we have a major problem with
10 overclassification; and the fact of overclassification significantly
11 weakens the inference that the government asks this court to draw
12 from the OCA's testimony. If allowed, it's not just the witnesses we
13 listed, but other witnesses, even the government's own witnesses,
14 will talk about, you know, the fact that information is classified
15 much longer than it should be, and when you think about it, that
16 makes sense. An individual, if they're looking at something and
17 they're not for sure, and they say, "All right, I'm going to classify
18 this," the default is let's classify it for longer. Who's going to
19 get in trouble for keeping information classified longer than it
20 needs to be? No one, and the court started this by asking, well,
21 what does the Overclassification Act do? And the Overclassification
22 Act addresses that problem of saying, Look. We classify things much
23 too often, for much too long. We have way too many OCAs, and that

1 was something that exploded really in the -- in the '90s, people who
2 are classifying things left and right. Even in this hearing, we've
3 got exhibits that are classified by the government for 25-plus years;
4 their responses to certain things or their notification, just because
5 it contains a particular word of it -- that is currently classified,
6 but it's classified by the government, not an OCA. So you look at --
7 you look at this problem and only when the court actually takes in to
8 a contextual understanding of classification, what it means and the
9 problem of overclassification can you make a determination that's not
10 a determination made in a vacuum of whether or not this is, in fact,
11 information that could cause harm and whether or not this is
12 information that's related to the national defense.

13 Again, this kind of dovetails with our motion to compel
14 witnesses that will be done tomorrow, but the government, again,
15 wants to ignore the fact that it is a problem, and they want the
16 court to take the quick route of its classified, an OCA says so, so
17 it must, in fact, be damaging to the United States and PFC Manning
18 must, in fact, have known that when there are other individuals who
19 make classification determinations as well. Mr. Hall makes
20 classification determinations to declassify information, and he will
21 talk about the fact that information in this case did not need to be
22 classified.

1 MJ: Does he make classification determinations on the
2 information -- particular information in this case?

3 CDC[MR. COOMBS]: No, he doesn't, but the problem, again, here,
4 he makes declassification determinations for his agency, and, again,
5 there has to be a fine line that, at least the defense is hoping,
6 that the court agrees with and that is an OCA does, in fact, have the
7 final say on how we handle something, that is -- that's true, but the
8 OCA does not have the final say in this courtroom on whether or not
9 this information reasonably -- PFC Manning reasonably should have
10 known it could cause damage to the United States and doesn't have the
11 final say on whether or not this information relates to the national
12 defense.

13 MJ: Well, I agree with that; that's up to the fact finder.

14 CDC[MR. COOMBS]: Exactly, and so the government is going to put
15 up the OCA in order to present its evidence to get the fact finder to
16 agree that he did have a reason to believe and it is national defense
17 information and we're just simply trying to offer the opposite with
18 our own fact witnesses who, in fact, do have expertise to make an
19 opinion, either because like in Colonel Davis's situation, he dealt
20 with information, or in Mr. Hall or Mr. Ganiel's situation where they
21 became fact witnesses based upon the research they've done and their
22 experience as intel analysts.

1 MJ: Do you have any case law to point me where in a 793(e) or
2 any other of the elements here that an OCA's determination -- that
3 another witness can come in and say, "Well, based on my experience, I
4 just disagree with him. It shouldn't have been classified"?

5 CDC[MR. COOMBS]: Yeah, just about any -- well, I mean, fact --
6 straight on with somebody disagreeing with an OCA, no, although Diaz,
7 I think, establishes the foundation for the court to see that you can
8 question the determination of classification, ----

9 MJ: I ----

10 CDC[MR. COOMBS]: but ----

11 MJ: ---- I don't have any issues with that, you know,
12 cross-examining him -- cross-examining an OCA on, well, you know, be
13 aware of (a), (b), (c), (d), and (e), ----

14 CDC[MR. COOMBS]: Uh-huh.

15 MJ: ---- yes, I was. I did or didn't consider these things,
16 all of that, but do you have any case law where Witness B came in and
17 said, "Well, I'm a witness with intelligence expertise and I disagree
18 with the OCA"?

19 CDC[MR. COOMBS]: Any 608(c) case where ----

20 MJ: I'm looking at a 793(e) case. Have there been any ----

21 CDC[MR. COOMBS]: No, ----

22 MJ: ---- of those cases ----

23 CDC[MR. COOMBS]: ---- no, I meant, ----

1 MJ: ---- that have allowed that?

2 CDC[MR. COOMBS]: ---- Your Honor, any M.R.E. 608(c), where the

3 cases on this point are very, very clear and straightforward in that

4 the defense is entitled to explore any motive, bias, or prejudice.

5 Our opinion would be any OCA getting on the stand would have an

6 inherent motive, bias, or prejudice because of the fact, in this

7 instance, the government has declared itself as a victim of this

8 information. There is a natural tendency, then, if you're the OCA to

9 say -- what OCA is going to get up and go, "You know what? We

10 overclassified this. It shouldn't have been classified; our bad."

11 No OCA is going to do that, and there is an inherent bias and

12 prejudice or motive to fabricate in this case where you would

13 exaggerate the harm and that bears out in the damage assessments and

14 that bears out in reality of what's happened since 2010 to today. So

15 just about any 608(c) case would say any witness that gets on that

16 stand the defense is entitled to explore bias, prejudice, motive to

17 fabricate, and we can do that with extrinsic evidence and so that

18 would bring in witnesses.

19 MJ: So what's the foundation for this opinion then; who gets to

20 come in and make an opinion that I disagree with the OCA?

21 CDC[MR. COOMBS]: Well, again, and that's why it becomes

22 relevant and this is an issue that normally would play out when you

23 have the actual witness take the stand and testify. We have to

1 establish the foundation for that witness's opinion; and, again, just
2 using Colonel Davis as the easiest, straightforward example, he would
3 say, "As the chief prosecutor, I was chief prosecutor for this time
4 period. I reviewed DABs on, you know, a quite frequent basis. At
5 the time that I reviewed the DABs and my other prosecutors used them,
6 we used them primarily just for biographical information. We called
7 them 'baseball cards.' They were not sensitive information. We did
8 not use that for intel collection and they were not based upon intel
9 collection. They were not updated once they were completed.
10 Subsequent judicial proceedings, subsequent documents prepared by my
11 office were much more detailed, were much more involved. These
12 documents were not." That would be the foundation for it, and then
13 the fact that he can -- he can testify, "I know -- I might not have
14 seen," and that's one of the other objections by the government of,
15 well, he can't testify to the charged documents. Well he, yeah, he
16 doesn't know for sure which charged documents because the government
17 hasn't given us permission to share those with him yet, but he can
18 say, "I've seen all of the DABs, so I'm sure I've seen the charged
19 documents," and I am aware of the fact that" ----

20 MJ: Well as a -- he's seen all the DABs up until when?

21 CDC[MR. COOMBS]: When he -- when he stopped being the chief
22 prosecutor, but we didn't bring anyone else new there; all the DABs
23 were completed at that point. And so not only that ----

1 MJ: Just to make sure I'm clear, so it's the defense's position
2 that the DABs at issue in this case would be the same ones that were
3 pre-2007.

4 CDC[MR. COOMBS]: Not pre-2007 per se. They -- yes -- actually,
5 no. Your Honor. The ones that are charged, I believe so, yes.
6 I'll have to verify that, but I believe so, yes.

7 And our position would be that the Combatant Status Review
8 Tribunals that were part of a FOIA release by CENTCOM contains much,
9 if not all, of the information within the DABs. Other publicly
10 released documents by the government in litigation, habeas litigation
11 contains much, if not all, of the information within the DABs.

12 MJ: Publicly released before or after the alleged releases
13 here.

14 CDC[MR. COOMBS]: Before, Your Honor.

15 And so because of that and with that foundation, then this
16 witness would testify, "You know what? I understand that the OCA is
17 saying that this could cause serious damage to the United States or
18 this could cause damage to the United States. I disagree," and
19 there's my foundation for that. And so the defense should be
20 entitled to present that evidence and obviously then the court would
21 take a look at everything, the inherent bias of the OCA, the other
22 evidence that the court has, the damage assessments, the documentary
23 evidence that we elicit through our witnesses in order to at that

1 point make a determination along with now the context of knowing the
2 government overclassifies information and make a determination did
3 PFC Manning have a reason to believe or is this information related
4 to national defense.

5 MJ: All right, thank you.

6 CDC[MR. COOMBS]: Thank you, Your Honor.

7 ATC[CPT OVERGAARD]: Subject to your questions.

8 MJ: All right.

9 Because the issues in today's motions and tomorrow's
10 judicial notice motions are all intertwined, the court wants a full
11 picture of what's at issue here, so my plan is to take all of these
12 issues under advisement, we're meeting again next week, on the 16th
13 and 17th, but my goal is absent something that is unforeseen at this
14 time to at least have preliminary rulings for that session, but I'm
15 not going to have any rulings on these issues during this session.

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: All right.

19 Major Fein, the only other thing that we have on the agenda
20 today is the release of the Article 13 opinion. Do the parties want
21 a recess or do you want to drive on?

22 TC[MAJ FEIN]: A short recess, Your Honor.

23 MJ: All right.

1 CDC[MR. COOMBS]: No objection, Your Honor.

2 MJ: Okay, how long would you like?

3 TC[MAJ FEIN]: Fifteen minutes, Your Honor.

4 MJ: All right, court is in recess until 1415.

5 **[The Article 39(a) session recessed at 1400, 8 January 2013.]**

6 **[The Article 39(a) session was called to order at 1418, 8 January
7 2013.]**

8 MJ: This Article 39(a) session is called to order. Let the
9 record reflect all parties present when the court last recessed are
10 again present in court.

11 The court is prepared to rule on the Article 13 motion in
12 this case.

13 On 27 July 2012 the defense filed a motion to dismiss for
14 unlawful pretrial punishment, in violation of Article 13, Uniform
15 Code of Military Justice and the Fifth and Eighth Amendments to the
16 United States Constitution. Alternatively, the defense motion
17 requests 10 for 1 sentencing credit from 27 August 2010 through 20
18 April 2011. On 17 August 2012 the government filed a response to the
19 motion opposing dismissal and sentencing credit except for 7 days for
20 the period of 6 through 8 August and 19 and 20 January 2012 where the
21 Marine Corps Brig Quantico brig officer, which will now be referred
22 to as MCBQ for the brig and Brig O for the brig officer, maintained
23 the accused in Suicide Risk, SR, status after a medical officer

1 opined he was no longer considered to be a suicide risk, in violation
2 of Secretary of the Navy Instruction, SECNAVINST, 1640.9C, Enclosure
3 (1), paragraph 5(d). Supplemental briefs were filed by the defense
4 on 24 August 2012 and by the government on 7 September 2012. The
5 court also ordered the government to produce to the defense
6 approximately 1400 e-mails exchanged among Marine Corps Brig Quantico
7 command and staff and higher headquarters during the period of the
8 accused's confinement at MCBQ.

9 On 26 November through 2 December, 5 through 7 December,
10 and 10 through 11 December 2012, the parties presented testimony,
11 evidence, and argument regarding this motion. Having received the
12 briefs, heard the witnesses, and examined the e-mails and physical
13 evidence presented by the parties, the court finds and rules as
14 follows:

15 Findings of Fact.

16 General -- Governing Regulations and Relevant Provisions.

17 SECNAVINST 1640.9C, 3 January 2006.

18 SECNAVINST 1640.9C governed corrections policy for the Navy
19 and Marine Corps during the period of the accused's confinement as a
20 pretrial detainee at MCBQ from 29 July 2010 through 20 April 2011.
21 Relevant portions of the SECNAVINST to this case are found in
22 Enclosure (1), Chapter 4, and are summarized below.

1 The SECNAVINST governs corrections policy for both post-
2 trial prisoners and pretrial detainees. As such, some of the
3 provisions must be read to apply primarily to post-trial prisoners.
4 The term "prisoners" includes both pretrial detainees and post-trial
5 prisoners.

6 1. Custody Classification Guidance. The purpose of
7 custody classification is to establish the degree of supervision
8 needed for control of individual prisoners. Custody classification
9 provides guidance for the supervision of prisoners and permits
10 establishment of security measures consistent with the requirements
11 of the individual. The SECNAVINST recognizes there are wide
12 variations in personality and mentality among prisoners. Where there
13 is fair and impartial treatment, prisoners generally present no
14 serious disciplinary problems. Some prisoners are deliberately
15 uncooperative; some have personality difficulties, which make them
16 chronic sources of trouble, such as highly aggressive -- as the
17 highly aggressive person or those acutely depressed. Efforts must be
18 made to identify all special cases and control measures instituted to
19 ensure the safety and orderly administration of the confinement
20 facility. An objective custody classification process which
21 addresses the characteristics of the prisoners shall be used per
22 reference (t); the Correctional Management Information System,
23 CORMIS, electronic equivalent is also authorized.

1 2. Pretrial Detainee Custody Classification. Pretrial
2 detainees receive custody classification as either Maximum Security
3 (MAX) or Medium In (MDI).

4 MAX is appropriate for detainees who require special
5 custodial supervision because of the high probability of escape, who
6 are potentially dangerous or violent, and whose escape would cause
7 concern of a threat to life, property, or national security.
8 Ordinarily, a small percentage of prisoners shall be classified as
9 MAX. The following procedures apply to prisoners classified as MAX
10 custody.

11 (1) Supervision must be immediate and continuous. A
12 Department of Defense Form (DD) 509, Inspection Record of Prisoner in
13 Segregation, shall be posted by the cell door and appropriate entries
14 made at least every 15 minutes.

15 (2) They shall not be assigned to work details outside the
16 cell.

17 (3) They shall be assigned to the most secure quarters.

18 (4) MAX prisoners shall wear restraints at all times when
19 outside the maximum security area and be escorted by at least two
20 escorts.

21 (5) On a case-by-case basis, the brig officer in charge may
22 authorize additional restraint for movement of MAX prisoners.

1 b. Medium In (MDI) is appropriate for detainees who
2 present security risks not warranting MAX. They are not regarded as
3 dangerous or violent. The following procedures apply to prisoners
4 classified as MDI custody.

5 (1) Supervision shall be continuous within the security
6 perimeter and immediate and continuous when outside the security
7 perimeter of the confinement facility.

8 (2) They shall not be assigned to work outside the security
9 perimeter.

10 (3) They shall wear restraints outside the security
11 perimeter unless the Brig O directs otherwise; and

12 (4) They may be assigned dormitory quarters.

13 c. Differences between MAX and MDI custody at MCBQ. At
14 MCBQ, all detainees regardless of custody level live in individual
15 cells in Special Quarters 1. MAX detainees may not work outside the
16 cell; MDI may. MAX detainees wear restraints at all times when
17 outside the maximum security area and must be escorted by at least
18 two escorts. MDI detainees wear restraints outside the security
19 perimeter unless the Brig O directs otherwise. Two or more staff
20 members must be present when the MAX detainee is out of his cell.
21 MAX detainees must be checked on every 15 minutes with entries posted
22 on a DD 509, Inspection Record of Prisoner in Segregation.

1 d. Classification Criteria. Custody classification shall
2 be based on amount of supervision and restraint each prisoner
3 requires. All new prisoners except those specifically deemed to be
4 serious management problems, MAX, shall be assigned an MDI custody
5 classification during the reception phase. Ultra-conservative
6 custody classification results in a waste of prisoner and manpower --
7 and staff manpower. Prisoners shall be placed in the lowest custody
8 classification as soon as possible.

9 (1) Non-all-inclusive factors considered in accessing
10 higher custody classifications, MDI or MAX: (1) assaultive behavior;
11 (2) disruptive behavior; (3) serious drug abuse; (4) serious
12 civil/military criminal record, convicted or alleged; (5) low
13 tolerance of frustration; intensive acting out or dislike of the
14 military; (6) -- excuse me -- dislike of the military, and history of
15 previous escapes; (6) pending civil charges/detainer filed; (7) poor
16 home conditions or family relationships; (8) mental evaluation
17 indicating serious neurosis or psychosis; (9) indication of
18 unwillingness to accept responsibility for personal actions past or
19 present; demonstrated pattern of poor judgment; and (10) length, or
20 potential length, of sentence.

21 (2) Non-all-inclusive factors indicating lower custody
22 classifications, MDO, Minimum, or IC: (1) clear military record,
23 aside from the present offense; (2) close family ties; good home

1 conditions; (3) offense charged is not serious; (4) apparently stable
2 mental condition; responsible for own actions; (5) indications the
3 individual wishes to return to duty; (6) comparatively short sentence
4 to confinement; however, length of sentence shall not be an
5 overriding factor; (7) behavior during a previous confinement; and
6 (8) completion of, or active participation in, treatment programs or
7 groups.

8 (3) The above factors are indicators, not ironclad rules.
9 The Brig O shall consider objective based overrides when applicable.
10 An evaluation of all phases of the prisoner's performance shall be
11 made prior to each custody change. The court notes the SECNAVINST
12 refers to factors considered in higher versus lower custody
13 classification. Pretrial detainees are not eligible for Medium Out,
14 Minimum Custody, or IC. MCBQ considered lower classification levels
15 to determine whether MDI rather than MAX custody was appropriate.
16 Per the SECNAVINST, each staff member has the responsibility for
17 passing information concerning prisoners to the proper authority in
18 the confinement facility. What seems to be a bit of trivial
19 information may prove to be significant when coupled with other
20 information at hand. Behavior and attitude of the prisoner in the
21 berthing area, at work, in recreation, and in a classroom provide a
22 good overall indicator of problem areas and adjustment progress.

1 Continuous staff evaluation of each prisoner cannot be
2 overemphasized.

3 (3) Special Quarters. Special Quarters is a group of cells
4 used to house prisoners who have serious adjustment problems, create
5 anxiety or disruption among other prisoners in the general
6 population, or who need protection from other prisoners. SQ is a
7 preventive management tool, not to be used as a punishment, except
8 when the procedures for disciplinary segregation are followed. The
9 SECNAVINST recognizes that some prisoners require additional
10 supervision and attention due to personality disorders, behavior
11 abnormalities, risk of suicide or violence, or other character
12 traits. If required to preserve order, the Brig O or in his or her
13 absence the Brig Duty Officers, DBO -- or BDO, excuse me, or Duty
14 Brig Supervisors, DBS, may authorize Special Quarters for such
15 prisoners for the purpose of control, prevention of injury to others
16 or themselves, the orderly and safe administration -- and the orderly
17 and safe administration of the confinement facility. A hearing to
18 determine the need for continued administrative segregation of the
19 prisoner shall be conducted. This hearing may be by board action or
20 by a member of the confinement facility appointed in writing by the
21 Brig O and a written recommendation to the Brig O will be provided
22 within 72 hours of the prisoner's entry into segregation. All
23 detainees in SQ shall be under the -- continual supervision, sighted

1 at least once every 15 minutes by a staff member, visited daily by a
2 member of the medical department and the Brig O with daily visits by
3 a chaplain encouraged. As with MAX custody detainees, DD 509,
4 Inspection Record of Prisoner in Segregation, shall be used to
5 document visits. Prisoners assigned to SQ shall not have normal
6 privileges restricted unless privileges must be withheld for reasons
7 of security or prisoner safety, i.e., suicide risk. For each 30 days
8 a prisoner is retained in SQ, the C&A board shall review and provide
9 a recommendation for the Brig O, who will determine and certify the
10 requirement for continuation in SQ. A segregated prisoner shall be
11 released to regular quarters as soon as the need for special
12 segregation is passed.

13 a. Status. Although the SECNAVINST does not use the word,
14 quote, unquote, status, Navy and Marine Corps corrections staff
15 routinely used the word "status" to define whether a detainee is
16 within the general population, in administrative segregation, or in
17 disciplinary segregation.

18 b. AS. The SECNAVINST defines "AS," administrative
19 segregation, to be the involuntary or voluntary separation for
20 specific cause of select prisoners from the general population to SQ
21 for the purpose of control, preserving order, prevention of injury to
22 themselves or others, and for the orderly and safe administration of

1 the confinement facility. AS must be authorized by the Brig O or in
2 his or her absence the DBO or DBS.

3 c. Suicide Risk and Prevention of Injury, SR and POI, as
4 AS. Both SR and POI are subcategories of AS. POI includes
5 prevention of injury to the prisoner and to staff. The decision to
6 retain a prisoner on POI rests with the Brig O. The SECNAVINST
7 provides that for behavior and custody problems, on rare occasions it
8 may be necessary to confine violent prisoners in cells without
9 furnishings to prevent them from injuring themselves or others. Such
10 a measure shall be used only upon specific direction of the Brig O.
11 A segregated prisoner shall be released to regular quarters as soon
12 as the need for special segregation is passed. There is no
13 additional guidance or criteria in the SECNAVINST for POI beyond that
14 of AS nor is there any specific requirement for mental health
15 provider input; however, the SECNAVINST encourages medical officer
16 participation in the C&A board where practicable. For SR, the
17 SECNAVINST states in relevant part that prisoners who have threatened
18 suicide or made a suicidal gesture but are found fit for confinement
19 and prisoners with a history of suicide attempts or who are
20 considered suicidal may be placed in SR under continuous observation
21 -- excuse me -- be placed in Special Quarters, SQ, under continuous
22 observation while in the category of SR, Suicide Risk. Such
23 prisoners shall be immediately referred to the medical

1 department/clinical services/ mental health department for further
2 evaluation and appropriate action. The Brig O may direct removal of
3 a prisoner's clothing when deemed necessary. They shall not be
4 permitted to retain implements with which they could harm themselves.
5 When prisoners are no longer considered to be SR by the medical
6 officer, they shall be returned to appropriate quarters. Thus,
7 unlike POI where authority to continue the status vests in the Brig
8 O, the SECNAVINST gives the medical officer authority to determine
9 whether and when to remove a prisoner from SR status.

10 d. AS/SR/POI and MAX Custody. Although there are required
11 15-minute checks for both AS and MAX custody, there is nothing in the
12 SECNAVINST addressing whether MAX custody classification is required
13 for prisoners assigned to SQ under Administrative Segregation/Suicide
14 Risk or Administrative Segregation/POI. In contrast, paragraph
15 5105(e) **[sic]** states that assignment to Disciplinary Segregation does
16 not automatically warrant a reduction to Maximum custody and
17 paragraph 5105(e)(9) states that prisoners released from DS shall
18 normally be placed in MDI custody.

19 The C&A board reviews custody classification and continuation in SQ
20 as Administrative Segregation/Suicide Risk or Administrative
21 Segregation/POI as separate determinations.

22 4. Classification and Assignment Board. The C&A board
23 establishes an individual prisoner's custody classification using

1 objective classification/reclassification procedures. When the C&A
2 board determines custody classifications, it shall be composed of the
3 Brig O or designee -- his designate, one senior staff member from
4 security and one from programs, and any other members appointed by
5 the Brig O. At consolidated brigs, a mental health specialist and
6 chaplain shall be assigned. Where practicable and not assigned to
7 facility staff, representatives from outside the confinement
8 facility, such as a psychologist or chaplain, may be appointed to the
9 board. The board meets at least weekly. Prisoners may appear before
10 the board. The C&A board uses the classification criteria described
11 above. The C&A board also reviews SQ prisoners every 30 days. The
12 C&A board may be reported in the CORMIS or DD Form 2711, Initial
13 Custody Classification; DD 2711-1, Custody Reclassification; and DD
14 27-2 [sic], Custody Initial/Reclassification Summary Addendum. When
15 immediate action is necessary, the Brig O may make changes in
16 custody, classification, et cetera, without board action. Changes
17 shall be part of the agenda for the next C&A board.

18 5. Time for Sunshine/Recreation Call. The SECNAVINST does
19 not use the term, quote, unquote, sunshine call. It does use the
20 term, quote, unquote, recreation as a privilege. A "privilege" is
21 defined as a benefit afforded to prisoners over and above minimum
22 statutory requirements. Privileges can be removed for rule
23 violations but only after a due process hearing, e.g., a disciplinary

1 and adjustment, D&A, board. Privileges often include, but are not
2 limited to, commissary visits, phone calls, television, radio,
3 movies, recreation, special events, and special visits. In paragraph
4 5105(e) (5) addressing policies for disciplinary segregation, the
5 SECNAVINST provides that a 1-hour exercise period shall be granted
6 daily when the prisoner's behavior is satisfactory. The SECNAVINST
7 is silent regarding a minimum amount of exercise period for non-
8 disciplinary segregated prisoners.

9 6. Visitation. The Brig O may deny visitation for good
10 cause, e.g., civilian or military protective orders; legitimate
11 rehabilitative interests; and good order, discipline, and security of
12 the facility. Official, Press, and Civilian Visits: Requests for
13 general visiting of the confinement facility by groups or individuals
14 shall be coordinated with the local Public Affairs Office, PAO.

15 Marine Base Quantico -- Marine Corps Base -- Brig Quantico
16 Base PCF Order P1640.1c, dated 1 July 2010.

17 The brig policies largely mirror the SECNAVINST. Although
18 signed by CWO4 Averhart on 1 July 2010 on or about the time of the
19 brig transfer from a Level 1 to a pretrial detention facility, some
20 of the policies appear to address post-trial detainees and
21 functioning as a Level 1 facility. Relevant differences or
22 supplements in comparison to the SECNAVINST are set forth below.

1 1. Paragraph 2006 - SQ. MCBQ has 36 single occupancy
2 cells, SQ1 consisting of 30 cells and SQ2 with 6 cells. All cells
3 in SQ are 6 feet wide, 8 feet long, and 8 feet high. SQ permits --
4 cells permit inmates to converse and be seen by other staff -- all
5 staff members.

6 2. Paragraph 2007 - Exercise/Recreation and Training.
7 Outdoor exercise areas for general population will be provided to
8 ensure that prisoners receive at least one hour of exercise in
9 accordance with the Plan of the Day, POD; or PCF Supervisor; or CO
10 discretion. An additional exercise area is provided for those
11 prisoners within the population who cannot participate in general
12 population recreation call due to custody or current handling
13 requirements. This area is contained within the locking gate.
14 Prisoners in segregation will receive recreation call in accordance
15 with the Plan of the Day and their handling letter.

16 3. Paragraph 6004(1) - Classification and Assignment,
17 Maximum Custody. Prisoners requiring special custodial supervision
18 because of the higher probability of attempted escape due to
19 potential length of sentence or because they are charged with a
20 dangerous or violent offense and escape would cause concern for a
21 threat or life to [sic] property. A prisoner may be designated as
22 maximum custody because they [sic] have been determined to pose a
23 threat to their own safety or another individual's safety.

1 Ordinarily, only a very small percentage of prisoners should be
2 classified as maximum custody.

3 4. Paragraph 6004(11)(d) - Special Quarters/Suicide Risk.
4 Those prisoners who have either attempted or considered committing
5 suicide will be aside -- will be assigned to MAX custody. Medical
6 officer approval is required. When prisoners are no longer
7 considered to be suicide risks by a medical officer, they shall be
8 returned to appropriate quarters once the PCF commanding officer's
9 approval is given. The court finds the PCF commanding officer is the
10 Brig O at Marine Corps Brig Quantico.

11 5. Paragraph 6004(11)(e) - Special Quarters/POI. Those
12 prisoners who have given an indication they intend or are
13 contemplating harming themselves or others will be assigned Maximum
14 custody. The court notes that this paragraph is not consistent with
15 paragraph 6004(1) above, which states that POI prisoners may be
16 considered for Maximum custody.

17 6. Paragraph 8031(a) - Authorized Visitors. States the
18 same as the SECNAVINST.

19 Background - Prior to the Accused's Transfer to Theatre
20 Confinement Facility Kuwait on 31 May 2010.

21 1. The accused's Basic Active Service Date, BASD, is 2
22 October 2007. He attended basic training at Fort Leonard Wood,
23 Missouri. On 28 March 2008 in his 9th week of training, while on

1 holdover status due to medical problems, the accused was command
2 referred to mental health for, quote, unquote, fits of rage. The
3 accused reported he was increasingly anxious because of graduation in
4 5 days. He reported no prior mental health history and he was on no
5 medications.

6 2. The accused graduated from basic training, completed
7 advanced individual training at Fort Huachuca, Arizona, and did a
8 permanent change of station to Fort Drum on 18 September 2008.

9 3. On 30 June 2009 the accused was command referred to
10 mental health at Fort Drum for difficulties adapting to his unit.
11 His NCOI -- noncommissioned officer in charge, NCOIC, Master Sergeant
12 Paul Adkins, reported that upon being confronted by his supervisor
13 for missing morning formation, the accused began screaming
14 uncontrollably and clenching his fists with his eyes bulged and his
15 face contorted. He screamed three times, then stopped, caught his
16 breath, and collected himself. Neither the accused nor the mental
17 health provider found any evidence of a significant mental health
18 problem. The accused was invited to return only if and as frequently
19 as he desired after JRTC.

20 4. On 19 August 2009 the accused self-referred to Fort
21 Drum mental health reporting he was isolating himself, losing
22 bearing, going downhill, crying, and feeling vulnerable. He also
23 reported he was going to break down that day and described a process

1 of bottling up emotions. The accused further reported he was not
2 taking medications, had a history of family dysfunction growing up,
3 and had been on Lexapro in the past. The accused was assessed with
4 an adjustment order [sic] with mixed emotional features.

5 5. On 15 September 2009 the accused was command referred
6 to the Fort Drum mental health clinic. The mental health provider
7 described the accused as presenting almost rigidly physically and
8 emotionally throughout the discussion when no other probable cause
9 for his being sent is developed, his demeanor is reflected as perhaps
10 being perceived as odd by others, although there does not appear to
11 be anything diagnosable about it. The accused reported that both
12 parents were alcoholics and that since separating from his mother he
13 has had to rely on himself for survival and for that reason very
14 carefully manages his interactions with others. The accused was
15 assessed with a personality disorder, not otherwise specified; mild
16 with cluster C characteristics, obsessive but not compulsive.

17 6. On 23 and 29 September 2009 the accused had follow up
18 appointments at Fort Drum mental health clinic. Discussion ensued
19 about the accused using intellectualization to avoid contacts that
20 may for some reason be emotionally difficult for him. The
21 29 September 2009 assessment found the accused had adjustment
22 difficulties typical of persons in their 20s, which he was quite
23 consciously exploring and engaging. He was doing fine. The mental

1 health provider anticipated one or two meetings -- more meetings
2 prior to the accused's deployment.

3 7. The accused deployed with his unit to Forward Operating
4 Base, FOB, Hammer, Iraq, on 11 October 2009.

5 8. On 24 December 2009 the accused was command referred to
6 FOB Hammer Combat Stress Clinic for a command directed evaluation due
7 to anger outbursts over the past month and a half where he shoved a
8 chair and began yelling at his NCOIC, Master Sergeant Paul Adkins,
9 after he counseled him on the loss of a room key and yelled and
10 flipped a table when counseled by two supervisors. The accused
11 reported that in 2005, he was prescribed Lexapro by a family
12 physician for problems he was experiencing with his stepmother and he
13 was referred to a physician by his aunt in 2007 due to anxiety
14 attacks he was having and once again put on Lexapro. With respect to
15 his current condition, the accused reported he was working the night
16 shift with three other Service Members and that it was lonely. He
17 reported persistent worry and anxiety about oversleeping and being
18 late for duty and also a hypersensitivity to criticism of his
19 mistakes. The accused was assessed with an anxiety disorder not
20 otherwise specified with cluster B/C personality traits and insomnia.
21 The accused had a normal mental status examination.

22 9. The accused had follow-up visits on 30 December 2009, 6
23 January 2010, 16 February 2010, 2 March 2010, 16 March 2010, 23

1 March 2010, 30 March 2010, and 6 April 2010. The accused discussed
2 problems he was having with a supervisor who was another E-4, his
3 difficulties in relating to people and how that manifests itself, and
4 his discomfort and guard when deflecting issues too close to his,
5 quote, unquote, comfort zone. The accused was reluctant to engage in
6 interventions to address his discomfort with discussing emotions or
7 sharing personal feelings. The accused was anxious and remained
8 focused on maintaining his behavior and expecting a different outcome
9 from other people.

10 10. Prior to 8 May 2010, the accused was not assessed to
11 be at risk of harm to himself or others. On 8 May 2010, the accused
12 was brought to the clinic by his NCOIC because he struck another
13 Soldier in the jaw. The accused disclosed to the mental health
14 provider that he desired to be opposite sex when grown and was coming
15 to grips about openly revealing that. He also reported he lived
16 openly with a wig as Breana Manning for 3 days while on leave.
17 Although not assessing the accused as a threat for harm to himself or
18 others, the mental health provider placed the accused on unit watch
19 and recommended that the command bring the accused to the Combat
20 Stress Clinic daily.

21 On 10, 12, 13, 15, and 19 May, the accused had follow-up
22 appointments at the Combat Stress Clinic. He did not show for the
23 12 and 15 May 2010 appointments. The accused advised he had been

1 transferred to the company and was doing clerical work that was
2 beneath him. He also expressed remorse for the assault and was
3 concerned over what his future would be in the Army. The accused
4 remained on unit watch.

5 12. On 17 May 2010, the accused received a company grade
6 Article 15 for the assault.

7 13. On 22 May, the accused's mental health provider opined
8 that his emotional and behavioral systems -- symptoms continue to
9 impair -- to cause impairment, the accused's progress for
10 rehabilitation was considered poor, and that a separation under Army
11 Regulation 635-200, Chapter 5-17 be initiated.

12 14. On 26 May 2010, the accused had a follow-up visit at
13 the Combat Stress Clinic. He reported he received the Article 15 for
14 the assault and had his rank reduced. The accused remained on
15 modified unit watch without access to a weapon.

16 15. On 28 May 2010, the accused's mental health provider
17 was advised that the U.S. Army Criminal Investigation Division was
18 investigating the accused for compromising secret information. He
19 was assessed to be at high risk of suicide, homicide, or AWOL and
20 remained on unit watch. The accused was also required to be under
21 guard by escorts. On the evening of 28 May 2010, the accused
22 contacted a colleague, Specialist Rebecca Schwab, gave her pieces of

1 paper, and asked her to check his e-mail and investments for him and
2 to open the e-mails, read, and write down whatever was in them.

3 16. The accused was placed in pretrial confinement at FOB
4 Hammer Brig on 29 May 2010. He was transferred to the Theater Field
5 Confinement Facility, TFCF, in Ku -- at Camp Arifjan, Kuwait, on 31
6 May 2010. The accused remained at TFCF until his transfer to Marine
7 Corps Brig Quantico on 29 July 2010.

8 TFCF Kuwait 31 May to 29 July 2010.

9 1. On 1 June 2010, the accused's initial class -- custody
10 classification was Medium custody. He was held in administrative
11 segregation in a cell in Echo-1 tent. On 2 June 2010, the accused
12 collapsed in his cell.

13 2. The accused was subsequently moved into the general
14 population 20-man tent with three to six other detainees. Reveille
15 was at 2200 and the day ended at 1300 or 1400. The accused
16 participated with the other detainees in outdoor recreation call and
17 visits to the dining facility and the recreation tent.

18 3. On or about 9 June 2010, the accused announced in front
19 of a group of detainees that he was gay after he became agitated they
20 were making negative comments about gay people. When asked on 11
21 June 2010 by MACM Chris Moore if he felt threatened by the other
22 inmates, the accused responded he didn't feel threatened but they
23 might feel threatened. After the interview, the accused took deep

1 breaths as if having an anxiety attack. Captain Balfour from Kuwait
2 Mental Health Clinic arrived. The accused started crying saying he
3 was sorry. He subsequently advised cadre he was gay and a woman. He
4 often became nonresponsive to verbal communications and orders from
5 cadre, followed by an anxiety attack. During one incident he ran
6 around in circles outside the yard before finally laying down on the
7 ground and refusing to stand up. The accused had to be carried back
8 to his cell.

9 On 14 and 8 -- 14 and 28 June 2010, the accused was seen at
10 the Kuwait Mental Health Clinic to address concerns with anxiety. He
11 presented with disheveled hair, although otherwise unremarkable.
12 There was no evidence of current suicidal or homicidal ideation or
13 intent.

14 5. On 30 June 2010, after an inspection by MA2 Murin, the
15 accused became unresponsive to commands and began yelling
16 uncontrollably. MA2 Murin called Captain Balfour, the TC -- TFCF
17 Mental Health Officer. Both of them ordered the accused into his
18 cell. The accused refused. The accused then began screaming,
19 shaking, babbling, and banging the back of his head into an adjacent
20 wall. The accused was then placed into a cell in Echo-03 tent with
21 constant watch while he continued to mumble and bang the back of his
22 head against the floor. The accused also knotted sheets into nooses.

1 6. On 30 June 2010, the accused was reclassified to
2 Maximum Custody/Administrative Segregation/Suicide Watch 1:1.

3 7. On 3 July 2010, Captain Iverson, the Commanding
4 Officer, Expeditionary Medical Facility Kuwait formally requested the
5 Commander, Theatre Field Confinement Facility, to transfer the
6 accused to a facility with a separate locked and specialized
7 psychiatric ward or psychiatric nurses, both of which would be
8 required to manage a case of this high level of -- this level of high
9 risk and complexity for any extended amount of time. Captain Iverson
10 described the accused's condition as complex and appearing to be
11 long-term requiring close monitoring, one to one observation. On
12 11 July 2010, the Commander, 1st Armored Division and U.S. Division,
13 Center sent a memorandum to Commander, Army Corrections Command
14 advising that the Commander, Third Army/ARCENT order the transfer of
15 the accused from TCF - TFCF Kuwait. Although the memorandum
16 requested transfer of the accused to Mannheim Area Confinement
17 Facility, Mannheim, Germany, the accused was ultimately transferred
18 to Marine Corps Brig Quantico on 29 July 2010.

19 8. On 5 July 2010, the accused was advised of the original
20 charges preferred against him. Those charges were: four
21 specifications of Article 92, UCMJ, violations; and eight
22 specifications of Article 134, UCMJ, violations, to include one
23 specification assimilating 18 United States Code Section 793(e);

1 three specifications assimilating 18 United States Code Section
2 1030(a)(1); and four specifications in violation of Title 18 United
3 States Code Section 1030(a)(2). The maximum sentence that could be
4 imposed for the charged offenses would be reduction to the grade of
5 E-1, total forfeiture of all pay and allowances, confinement for 68
6 years, and a dishonorable discharge.

7 9. On 10 July 2010, the Article 32 investigating officer
8 scheduled the Article 32 investigation for 14 July 2010. On 12 July
9 2010, the accused was notified. The Article 32 investigation was
10 subsequently delayed and did not begin again until 16 December 2011.

11 10. On 30 June 2010, the accused was seen by -- seen at
12 the Kuwait Mental Health Clinic. The providers, Drs. Weber and
13 Hutcheson, reported increased levels of regressive behavior by the
14 accused, to include rocking himself, sitting on the floor immobile
15 despite requests that he move, and making nooses. During the
16 interview, the accused stated he didn't intend to use the nooses but
17 wanted to have the option of hurting or killing himself, even if he
18 didn't really do it. He wouldn't deny current suicidal ideations;
19 said he wouldn't tell anyone if he was thinking about doing it
20 because that would defeat the purpose. The accused stated he was
21 sleeping poorly and was confused with mood swings. He appeared thin
22 and exhausted and sat almost the entire time with his knees pulled
23 against his chest and his arms hugging his chest, looking into space

1 as he spoke. The mental health providers noted that the accused had
2 chronic suicide ideations without any delineation or plan or intent
3 currently. The mental health providers recommended the accused to
4 remain in his cell with alert 1:1 watch. They also prescribed
5 Clonazepam for insomnia and Citalopram.

6 11. The accused had the following follow-up sessions at
7 U.S. Mental Health Kuwait:

8 a. On 1 July 2010, Dr. Weber saw the accused in his cell.
9 His hair was disheveled, his eyes red and tearful and displayed poor
10 eye contact, staring off into the distance. The accused reported
11 being scared and hopeless. He again reported suicidal ideation and
12 plan without specific intent and he would not tell anyone if he did
13 attempt -- intend to attempt suicide. Dr. Weber recommended the
14 accused be transferred to a facility with more resources for higher
15 care, evaluation, and treatment.

16 b. On 2 July 2010, the accused was seen by Dr. Richardson.
17 In addition to the notes from 1 July 2010, this report noted the
18 accused was collecting several items that could potentially be used
19 for potential self-harm, such as metal. The accused remained
20 ambiguous about discussing suicidal thoughts, stating he was still
21 confused and uncertain. The accused stated clearly he would not
22 contract for safety or notify any staff if he decided to harm himself
23 or had increasingly -- increasing suicidal ideation.

1 c. On 4 July 2010, the accused was again seen by Dr.
2 Richardson and Dr. Weber. The accused's glasses had been returned.
3 During the session the accused described being seen by a psychologist
4 who thought he had obsessive compulsive disorder, possible
5 generalized anxiety disorder, and attention deficit hyperactive
6 disorder. When asked about suicidal ideations, the accused said,
7 quote, I don't know how I am supposed to feel, and again declined to
8 contract for safety or inform staff if he had a suicidal ideation.
9 The accused remained in diagnostic elevated high risk of self-harm,
10 remained on suicide watch 1:1, and recommended to have one book in
11 his cell.

12 d. On 6 July 2010, the accused was again seen by Dr.
13 Weber. He discussed reading, quote, unquote, Hunt for Red October
14 and discussed his IQ range. He appeared less anxious but reported he
15 considers suicide an option and feels a sense of relief that he is
16 able to have the option available if needed. He continued to decline
17 for safety and inform anyone if -- or inform anyone if he had a
18 suicidal ideation.

19 e. The accused was seen by Dr. Richardson on 8 and 10 July
20 2010. Although his anxiety appeared to be superficially calmer, he
21 remained ambiguous about his condition and safety, starting on 10
22 July 2010 in response to a direct question about whether he wanted to

1 kill himself, quote, Not right now, unquote, and, quote, It is always
2 an option, unquote. Again, he would not contract for safety.

3 f. On 12 July 2010, the accused was seen by Dr.
4 Richardson. He admitted he would like to die and have it all be over
5 and he would take his life if he was sure he could. He did not want
6 pain but did want death. He may or may not get out of the situation
7 and how permanent and how long-standing the matter was, was settling
8 in. The accused further stated he was at peace with the option of
9 dying and that he was a, quote, unquote, patient man. The accused
10 was found as heightened risk of self-harm and suicide watch 1:1
11 remained.

12 g. On 14 and 16 July, the accused had further follow-up
13 with Dr. Richardson. He was aware there was consideration about
14 moving him to another facility. He was frustrated and wanted to be
15 moved off suicide precautions. On 16 July 2010, the accused said he
16 would not hurt himself but admitted that he tried to lift the pin on
17 his cell door in the past and thought he could be successful. Dr.
18 Richardson believed the accused's statements that he would not hurt
19 himself were made to get off suicide precautions.

20 h. On 19 July 2010, the accused saw Dr. Richardson and was
21 noticeably irate and frustrated, stating he didn't have control over
22 his future. Dr. Richardson determined that although the accused
23 stated he would not kill himself, his reliability was poor. Quote,

1 His statements are taken in context of his assessment over a period
2 of time. He previously stated he accepted his death, that he had no
3 future, and would kill himself if he knew that he would die. He also
4 added -- he had added that he is a patient man. The accused's more
5 recent statement seems to be in context of wanting a change in status
6 and what he wears. There is little depth to his conversation when
7 talking about his emotions, such as when he disclosed his
8 helplessness. When interacting with others in the correctional
9 community, the accused acted out and decompensated. He also acted in
10 an unreliable way, making two nooses, collecting other items that
11 could be potentially used for self-harm, and seemingly deceitful
12 about that. The accused has a very fragile ego which could be
13 decompensated in that similar environment at this time. In
14 discussion with Captain Balfour, there are limited resources at this
15 facility; that combined with the member's unpredictability would
16 create vulnerabilities about his safety.

17 i. On 21 July, the accused saw Drs. Weber and Richardson.
18 The accused's anxiety and frustration levels were improved; essential
19 elements of daily life, including physical care and intellectual,
20 social, and spiritual health. He was reading Tom Clancy novels and
21 reported exercising and eating well with an increase -- increasing
22 abilities to find meaning in moments. The accused remained at
23 elevated risk. The possibility of transfer raises his risk and a

1 transitional point for him. The accused was given a provisional
2 diagnosis of depressive disorder not otherwise specified requiring
3 further time and observation to make a final diagnosis.

4 j. On 24 July, the accused saw Dr. Richardson. He was
5 angry and irritated with a focus on trying to change his status and
6 1:1 watch. The accused stated he did not care about his safety in
7 the sense of relating to the quality of his life and was considering
8 legal action. Dr. Richardson explained that safety was a priority
9 issue. In the recent past, the accused was with other inmates.
10 There were rules he was expected to follow and did not; and that by
11 making one or two nooses, collecting things that could potentially be
12 used for self-harm, and he did not do well emotionally in the
13 community setting. The accused stated he understood the reasons for
14 placing him on suicide watch but he was a quote, unquote, different
15 person now. Dr. Richardson discussed reducing the restrictions on
16 the accused with the CO of TFCF; 15-minute checks were the next step
17 down. Both opined the risk was still too high to implement the
18 restriction.

19 k. On 27 July 2010, the accused was seen by Dr. Weber who
20 found him to be receptive and eager to engage. The accused felt the
21 medications were helpful and that he felt safe. In spite of the
22 improvement, Dr. Weber did not recommend decreasing the 15-minute
23 checks on the accused because of the setting and limited resources in

1 Kuwait and because the accused still demonstrated a large amount of
2 mood lability, splitting, potential manipulation, and low ego
3 strength.

4 On 28 July 2010, Dr. Richardson prepared a summary of
5 mental health condition and treatment of the accused during his time
6 in confinement at TFCF. The Assessment for Anxiety I was anxiety
7 disorder not otherwise specified, depressive disorder not otherwise
8 specified; Provisional, R/oMDD, Probable Gender Identity Disorder by
9 previous assessment.

10 12. On 29 July 2010, the deputy commander of the
11 confinement facility at Kuwait, Lieutenant Commander Jeffrey Barr,
12 prepared a memorandum for record regarding the accused's confinement
13 in Kuwait. Lieutenant Commander Barr observed the accused presented
14 with normal behavior during intake and for the initial few days, but
15 then began to exhibit abnormal behavior and his mental state
16 deteriorated. Ultimately, the confinement facility had to place him
17 on 24-hour suicide watch for the remainder of his detention there.
18 Prior to being placed on suicide watch, the accused announced he was
19 gay when he overheard other detainees making negative remarks about
20 homosexuals; and during the day following -- days following the
21 incident, he told cadre he was gay and a woman. He would often
22 become nonresponsive to verbal communications and orders from the
23 cadre which were sometimes followed by an anxiety attack. During one

1 incident, the accused ran around in circles before lying down in the
2 yard and refusing to stand up. Cadre had to carry him to his cell.
3 During a routine cell check, cadre found the accused curled in a ball
4 with a bed sheet tied into a noose next to him on the floor. Mental
5 health professionals evaluated him on several occasions throughout
6 his confinement. They found he had mental issues, to include being,
7 quote, unquote, emotionally decompensated and was at high risk to
8 harm himself or suicide. They recommended transfer to a facility
9 with adequate specialized resources and mental health professionals
10 available to manage his case over an extended period of time, which
11 did not exist in the facility in Kuwait.

12 13. On 29 July 2012, the accused was transferred from TFCF
13 to Quantico.

14 Military -- or Marine Corps Brig Quantico 29 July 2010 to
15 20 April 2011.

16 1. On or about June 2010, as a result of the Base
17 Realignment and Closure Act of 2005, BRAC, Marine Corps Brig Quantico
18 was converted from a Level 1 facility to a pretrial confinement
19 facility, PTC. Resourcing was cut 50 percent. Marine Corps Brig
20 Quantico was not structured to be a long-term pretrial confinement
21 facility. Post-trial prisoners could be held at Marine Corps Brig
22 Quantico for 30 days pending transfer. Marine Corps Brig Quantico
23 was not resourced to house pretrial detainees for more than 180 days;

1 see Pretrial Confinement Zero Based Review at Appellate Exhibit 280,
2 volume 3 of 6, pages 00513119 and 00513073 to 88. Pretrial detainees
3 housed at Marine Corps Brig Quantico after July 2010 were typically
4 held from two weeks to three months. Marine Corps Brig Quantico was
5 not resourced for long-term mental health or other treatment
6 programs. There were no organic mental health assets. Pretrial
7 detainees at Marine Corps Brig Quantico were assigned custody
8 classification of either MAX or MDI. All pretrial detainees
9 regardless of custody level were housed in individual cells in
10 Special Quarters 1 that were 6 feet wide by 8 feet long by 8 feet
11 high. The accused was housed in the same size cell as all other
12 pretrial detainees at Quantico regardless of custody level and
13 status. During the 264 days the accused was in pretrial detention at
14 Marine Corps Brig Quantico, the brig averaged between 5 and 20
15 prisoners staying a length of two weeks to approximately 3 or 4
16 months. No other prisoner during the accused's tenure at Marine
17 Corps Brig Quantico was on POI status longer than a few weeks.

18 2. At the time of the accused's arrival at Marine Corps
19 Brig Quantico on 29 July 2010 CWO4 Averhart was the Brig Officer in
20 Charge, Brig O; Master Sergeant Papakie was the Brig Supervisor;
21 Master Sergeant, then Gunnery Sergeant, Blenis was the Chief of
22 Programs and Senior Counselor. Master Sergeant Blenis was also the
23 accused's counselor. Captain Hocter provided mental health support

1 for Military -- Marine Corps Brig Quantico as an ancillary duty. He
2 was not an organic asset for the brig. He had been providing mental
3 health services to the brig since 2006 and was the mental health
4 provider when Captain Webb committed suicide on or about spring of
5 2010.

6 From 2010 to the present -- 3. From 2010 to the present,
7 prevention of suicide has been a top priority for the Department of
8 Defense and all of the military services. Suicide awareness and
9 prevention training is mandatory across the military services.
10 Marine Corps Brig Quantico had a pretrial detainee suicide, Captain
11 Webb, that's a Navy captain, during the year before the accused
12 arrived. Many of the brig staff worked at the brig during that time.
13 Captain Hocter provided mental health support to the brig. He did
14 not recommend Captain Webb be placed on Suicide Risk or Prevention of
15 Injury status. Captain Webb's suicide was a traumatic event for the
16 brig staff. At the time of the accused's arrival, Marine Corps brig
17 staff was hyper-vigilant regarding their duty to prevent pretrial
18 detainees from attempting or committing suicide. They also
19 mistrusted Captain Hocter's judgment as a mental health provider
20 because they believed he missed the indicators for suicide risk in
21 the Captain Webb case. Their approach to maintaining the accused on
22 POI status was to err on the side of caution, even overcaution.

1 4. On or about 28 July 2010, the brig was initially
2 notified of the accused's arrival. They were also aware of the
3 accused's mental health history in Kuwait. Upon learning of the
4 accused's pending transfer to Marine Corps Brig Quantico as a
5 potential long-term pretrial detainee, Colonel Choike, Quantico
6 Installation Commander, called Major General Horst, the accused's
7 General Court-Martial Convening Authority, to advise him of his
8 concerns about the brig's lack of resources for long-term pretrial
9 detainees.

10 5. On or about 28 July 2010, Colonel Choike held a staff
11 meeting that included Colonel Oltman, Security Battalion
12 Commander; Lieutenant Colonel Greer -- I'm sorry -- Lieutenant
13 Colonel Greer, Quantico Deputy SJA; CWO4 Averhart, the Brig O;
14 Quantico PAO staff; and other brig staff to address management of the
15 accused upon arrival. Lieutenant General Quinn -- Flynn, excuse me,
16 the Quantico Senior Mission Commander, did not attend the meeting but
17 was aware it occurred. The brig staff as well as Colonel Oltman,
18 Colonel Choike, Lieutenant Colonel Greer, PAO, and Chief Averhart
19 were aware that the accused was a high profile detainee who would
20 bring media and other attention to the Quantico brig and base.
21 Colonel Oltman ordered CWO4 Averhart to prepare a weekly report
22 regarding the status of the accused. CWO4 Averhart would forward the
23 report to Colonel Oltman who would then forward the report to Colonel

1 Choike. Lieutenant General Flynn was aware of the weekly reports and
2 received them from Colonel Choike, although perhaps not routinely.
3 Weekly reports on the accused began on 10 August 2010 and continued
4 until the accused was transferred on 20 April 2011 to Joint Regional
5 Confinement Facility, JRCF, with the final weekly report prepared on
6 13 April 2011. The weekly reports included Gunnery Sergeant Blenis's
7 weekly counseling notes of the accused and any significant events
8 evolving -- involving the accused that occurred that week.

9 6. After the accused arrived at MCBQ, Lieutenant General
10 Flynn was engaged both with Colonel Choike and Colonel Oltman on the
11 brig side and with Captain Mary Neill, Commander, Naval Health Clinic
12 and Captain Hocter's supervisor on the mental health side. On
13 9 August 2010, at 1342, Lieutenant General Flynn sent an e-mail to
14 Colonel Oltman and Choike with a 9 August 2010 *New York Times* article
15 about the accused. Lieutenant General Flynn stated that with one
16 suicide in the brig, the command needed to cover down on lessons
17 learned from that case. Lieutenant General Flynn stressed the
18 absolute necessity of keeping a close watch on the accused, to
19 include brig, medical, chaplain, and transport personnel. Lieutenant
20 General Flynn believed the accused's life had completely fallen
21 apart, making him a strong candidate -- from Lieutenant General
22 Flynn's perspective -- to take his own life. Colonel Choike
23 responded that Captain Neill agreed to prepare weekly mental health

1 reports from Captain Hocter regarding the accused's mental health
2 status and to forward these reports to Colonel Oltman and Colonel
3 Choike. The mental health status reports were in addition to the
4 Weekly reports from the brig. On 9 August 2010, at 1641, Lieutenant
5 General Flynn responded to Colonel Choike, quote, Dan, Just want to
6 make sure that you all know my intent and concerns. Is there a
7 secure mental health ward at Walter Reed? What medical authority
8 makes the call on his confinement location as well as his mental
9 fitness? For how long are suicide risk -- watch in Skivvies and a
10 blanket proper? Please make sure that there are procedures -- that
11 our procedures are correct, we have good assumptions, and we are
12 applying the regulations correctly, unquote. On 9 August 2010, at
13 1723, Captain Neill reported to Colonel Choike that Captain Hocter
14 opined the accused no longer needed to be on Suicide Risk as of
15 6 August 2011 and recommended changing the status to POI. On
16 9 August 2010, at 1819, Colonel Choike forwarded the mental health
17 status report to Lieutenant General Flynn with an e-mail stating he
18 had spoken with Colonel Oltman earlier who advised the Brig O
19 preference was to remain on SR a few more days. The court notes that
20 per the SECNAVINST the medical officer has authority to determine
21 when to remove a prisoner from SR status. See paragraph 3.c. above.
22 On 9 August 2010, at 1950, Lieutenant General Flynn responded with an
23 e-mail to Colonel Choike, asking, quote, With the status being

1 changed by the medical authority, what is the logic for continuing
2 other than OIC preference? unquote. Captain Neill; Colonel Miner,
3 the SJA; and Colonel Oltman were all cc'd on these e-mails. None of
4 the brig staff was cc'd. Lieutenant General Flynn did not
5 communicate directly with the Brig O or the brig staff. He did not
6 order brig officials to classify the accused in a particularly --
7 particular custody classification or status. He did not influence
8 brig decisions regarding the accused's custody or classification.
9 His intent was to ensure that appropriate regulations and procedures
10 were being applied correctly with common sense and that the accused
11 was receiving appropriate mental health treatment, that brig staff
12 and mental health providers were coordinating, and that the accused
13 was safe. Neither Colonel Choike nor Colonel Oltman ordered the Brig
14 O or the brig staff to reach any particular conclusions regarding the
15 accused's status or custody.

16 7. On the evening of 29 July 2010, the accused arrived at
17 Marine Corps Brig Quantico and began the indoctrination phase. While
18 completing his inmate background summary's mental health section, the
19 accused indicated he had considered suicide and wrote in the remarks
20 section, quote, Always planning, never acting, unquote. The accused
21 was not ordered to fill in remarks or told what remarks to write. He
22 wrote, quote, Always planning, never acting, unquote, of his own
23 volition.

1 8. The accused scored a "5" on the management factors for
2 initial custody classification. This would result in a custody level
3 of MDI. The DBS did an override to initially classify the accused as
4 MAX Custody/Suicide Risk. Also on 29 July, the Class -- C&A board
5 reviewed the classification of the accused. All three members
6 recommend MAX custody with indoctrination and SR status. The Brig O,
7 CWO4 James Averhart, approved the recommendation of the DBS and C&A
8 board.

9 9. A three-member C&A board met weekly to review the
10 accused's custody level and status. Master -- Gunnery Sergeant
11 Blenis, the accused's counselor, was normally the senior member of
12 the board. Gunnery Sergeant Blenis prepared the paperwork and
13 recommended custody level and status before the board met. Board
14 results were documented in CORMIS but not on Brig Form 4200.1,
15 January 11, until after the review of 3 January 2011. After that
16 review, the board results were documented on Brig Form 4200.1 until
17 the accused was transferred from Marine Corps Brig Quantico. The
18 board consistently remembered that the -- recommended that the
19 accused remain in MAX custody and on POI status, except for two
20 occasions where the board recommended the accused be placed in SR
21 status [pause] -- or, excuse me, except on one occasion where the
22 board recommended that the accused be placed on SR status; that would
23 be 18 January 2011. Both Brig O's, CWO4 Averhart and CWO2 Barnes,

1 approved all of the C&A board recommendations. The decision to
2 maintain the accused in MAX custody and POI status were based on
3 similar factors, the accused's history of violence toward himself and
4 others in FOB Hammer and Kuwait, his statements in Kuwait and on his
5 intake form that he was, quote, unquote, a patient man, quote,
6 Suicide is always an option, unquote, and, quote, Always planning,
7 never acting, unquote, indicating a never-ending time when the
8 accused may be considering suicide, the nature of the offenses
9 charged, the length of the potential sentence, poor family
10 relationships, low tolerance for frustration, requirement for mental
11 health treatment, and on the accused's guarded interaction and lack
12 of communication with his counselor and the brig staff. After
13 18 January 2011, the C&A board and the Brig O, CW2O [sic] Barnes,
14 added factors of disruptive conduct by the accused on 18 January
15 2011, his statements to the board that his initial form, "Always
16 planning, never acting" may have been false and his current
17 reassurances to the board that he was not suicidal may also be false.
18 On 2 March 2011, the C&A board and the Brig O added factors of the
19 accused's 2 March 2011 statement to Master Sergeant Papakie that he
20 could use the waistband of his underwear to kill himself, the
21 increased stressors to the accused of the receipt of new charges,
22 including aiding and abetting the enemy with a potential sentence of
23 life without parole or death if a capital referral, and the accused's

1 almost complete withdrawal from communication with the brig staff.

2 After 6 April 2011, the Brig O also considered manipulative and false

3 statements made by the accused to Lieutenant Colonel Russell and

4 increasing incidents of minor violations of the brig SOP. And after

5 2 March, also the accused removing visitors from his visitation list.

6 10. Captain Hocter was the mental health provider for the

7 accused from 29 July 2010 to 18 January 2011 when he deployed.

8 Because the accused was an Army Soldier, he consulted with Colonel

9 Malone, a mental health care provider from the Army to add

10 credibility to his assessments of the accused. Captain Hocter

11 visited the accused at least weekly and issued a one-page form to the

12 C&A board entitled, quote, Suicide Risk and Prevention of Injury

13 Assignment Review. The top line of that form stated, quote, The

14 following action is recommended for subject: Custody, Squad Bay,

15 Job. The, quote, Job portion is where SR or POI was recommended.

16 The form then had four block checks: (1) whether the detainee poses

17 a threat to himself or not; (2) whether the detainee requires further

18 mental evaluation; (3) whether the accused needs to be segregated

19 from the general population or not; and (4) whether the detainee has

20 a low or average tolerance of frustration or stress. Below the block

21 checks are lines for the medical officer's remarks. Captain Hocter

22 submitted SR and POR -- POI AR to the C&A board on the following

23 dates: 30 July 2010, SR recommendation; 6 August 2010, POI

1 recommendation; 20 August 2010, POI recommendation; 27 August 2010,
2 3, 10, 17, and 24 September 2010, Off POI recommendation/15-minute
3 checks for MAX custody sufficient; 15, 22, and 29 October 2010,
4 19 November 2010, Off POI recommendation; undated form between
5 27 September and 15 October 2010, Colonel Malone recommended the
6 accused be removed from POI; 10 December 2010, recommended POI. The
7 accused was not suicidal but under a great deal of stress; 13, 17,
8 23, and 30 December 2010 and 7 and 14 January 2010 [sic] Captain
9 Hocter recommended the accused be taken off POI.

10 The remarks column of Captain Hocter's SR and POR -- POI AR
11 forms were usually between two and five lines. The remarks provided
12 Captain Hocter's recommendation but not the reasons for his
13 recommendation. Some of the remarks were not legible. Captain
14 Hocter made scrivener's errors in the block checks on 3 and 17
15 September 2010 misstating that the accused needed to be segregated
16 from the general population and that the accused posed a threat to
17 himself. These errors confused the C&A board members and led them to
18 believe that Captain Hocter was unreliable and was, quote, unquote,
19 covering his six.

20 11. Captain Hocter provided mental health services as an
21 ancillary duty for the Marine Corps Brig Quantico since 2006. Marine
22 Corps Brig Quantico officials usually followed his recommendations
23 with respect to SR/POI status, although they delayed implementing

1 them. In the accused's case, the Brig O, CWO4 Averhart, delayed
2 implementing Captain Hocter's recommendations to remove the accused
3 from SR to POI from 6 to 11 August 2010, a total of 6 days, and again
4 delayed removing the accused from SR to POI from 18 to 20 January, a
5 total of 3 days. CWO4 Averhart did not implement any of Captain
6 Hocter's recommendations to remove the accused from POI status.

7 12. There was no meaningful communication between the Brig
8 O, the C&A board, or any of the brig staff and Captain Hocter
9 regarding the accused's mental health condition and what, if
10 anything, the conditions and his behaviors contributed to the
11 necessity of maintaining the accused on POI status. In addition, the
12 brig staff mistrusted Captain Hocter because they believed he
13 provided no notice of his visits, didn't spend enough time with the
14 accused to properly assess whether he was at risk of attempting
15 suicide, didn't provide reasons for his recommendations in the SR and
16 POI ARs, and failed to assess the Suicide Risk indicators in Captain
17 Webb.

18 13. During CWO4 Averhart/Captain Hocter tenure, the
19 accused remained in MAX custody and POI from 27 August 2010 through
20 18 January 2011 against the recommendation of Captain Hocter except
21 for a 3-day period between 10 and 13 December 2010 when Captain
22 Hocter recommended the accused remain on POI because of additional
23 stressors.

1 14. From 11 August 2010 through 18 January 2011, Gunnery
2 Sergeant Blenis's counseling notes consistently described the accused
3 as courteous and respectful with above -- average to above average
4 work reports and no disciplinary reports. The accused reported no
5 suicidal findings [sic]. He was cooperative with staff. The notes
6 do reflect that the accused -- do not reflect the accused complained
7 about or asked about POI or MAX custody status. The notes did
8 reflect that the accused was guarded in his communication with brig
9 staff and preferred to be left alone in his cell sitting on his rack.
10 The following odd behaviors were documented in the counseling notes:

11 a. 29 September 2010: documented that on 23 September
12 2010 the accused tried to send a letter signed as Briana Elizabeth
13 Manning.

14 b. 20 October 2010: the accused prefers to spend all day
15 sitting Indian style on his rack until taps. Although he is
16 authorized to have a book in his cell between reveille and taps, he
17 has read only two books since his arrival.

18 c. 25 November 2010: documents on 23 November 2010
19 Gunnery Sergeant Blenis overheard guards discussing strange and
20 unorthodox conduct observed by the accused in his cell, to include:
21 sword fighting imaginary characters in his cell; lifting imaginary
22 weights in his cell as if displaying actual strain and exertion;
23 staring in the mirror, making faces at himself for extended periods

1 of time. The accused was on occasion observed licking the bars to
2 his cell after taps. When questioned by the guards, the accused
3 acted as if he was just woken up and asked staff members how long he
4 was there.

5 d. 1 December 2010: the accused was observed dancing in
6 front of the mirror in his cell.

7 e. 8 December 2010: the accused was observed posing and
8 flexing his muscles in front of the mirror in his cell.

9 f. 15 December 2010: the accused was observed standing in
10 the middle of his cell with arms spread out and staring at the floor,
11 dancing in his cell like rave dancing, and playing peekaboo with
12 himself in the mirror.

13 The behaviors observed by the guards were unusual and
14 strange and were not commonly engaged in by MAX prisoners. The brig
15 staff and Captain Hocter never engaged to discuss the strange
16 behaviors exhibited by the accused and what, if anything, that meant
17 from a mental health perspective regarding the accused's need for
18 POI.

19 15. On 11 August 2010, the accused was downgraded from
20 MAX/SR to MAX/POI. The accused's special handling instructions
21 provide for the following: the accused (1) will wear restraints and
22 be escorted according to custody classification when leaving his
23 cell. The DBS will be notified prior to the accused moving outside

1 of Special Quarters. Control Center will commence lockdown; (2) the
2 accused is authorized sunshine call, television call, library call,
3 to make and receive phone calls, weekend/holiday visitation in a
4 noncontact booth, and to speak to occupants of other cells in a low
5 conversational tone; (3) is not authorized to lie on his rack between
6 reveille and taps unless on medical bed rest, to keep any gear inside
7 his cell with the exception of: one rules and regulations, one
8 mattress, one set of PT gear during the hours of reveille; (4) will
9 receive toilet paper upon request only; (5) will receive one
10 underwear and one POI blanket during taps; (6) will eat in cell with
11 metal spoon only; will have sick call, medication call, and chaplain
12 visits conducted at cell hatch with legal visits conducted at cell or
13 in a noncontact booth; remain in cell during fire drills, come to the
14 position of attention in front of the hatch upon entry of any
15 commissioned officer and will remain at attention until told to carry
16 on; address all enlisted duty personnel by their rank at parade rest
17 and will be required to stand at the position of attention for count
18 until duty -- until carry on is sounded. The following additional
19 instructions also applied to the accused: (1) will receive
20 correspondence material from 2020 to 2120, to include mail; legal
21 papers; envelopes; DD 510 forms; one pencil or pen; and one book,
22 religious or nonreligious; (2) will receive hygiene items in
23 accordance with the Plan of the Day only; (3) will receive a

1 20-minute sunshine call in the Special Quarters recreation yard; (4)
2 all gear will be removed from cell after taps with the exception of
3 one mattress, one underwear, and one POI blanket; (5) will wear a
4 second chance vest when leaving the facility on temporary absences at
5 all times. Starting on 27 October 2010, the accused's correspondence
6 time was increased to 2 hours from 1920 to 2120 and sweatpants and a
7 sweat top were authorized during periods of reveille. Starting on
8 10 December 2010, the accused was authorized 1 hour of recreation
9 call in the SQ recreation yard or inside recreation area in case of
10 inclement weather. The accused's restraints were to be removed
11 during recreation call. Library, TV call, and phones were brought to
12 the -- to MAX prisoners via a cart. The amount of TV call depended
13 on the amount of -- the number of MAX prisoners sharing the cart.
14 The accused frequently received more than 1 hour of TV call. In
15 addition, the accused was required to be observed every 5 minutes,
16 either in person or from the guard tower. The accused was
17 occasionally asked how he was doing and required to respond. He was
18 not asked how he was doing with each 5-minute check. On 15 September
19 2010, the Special Court-Martial Convening Authority, Colonel Coffman,
20 advised Colonel Choike that the Army required monitoring of the
21 accused's phone calls, visitation, and mail. Privileged
22 communications between the accused and his attorneys, mental health
23 providers, and brig chaplains were not monitored. Monitoring of

1 detainee communications and visits was not normal standard operating
2 procedure at Marine Corps Base [sic] Quantico. On or about
3 1 December 2010, the Brig O ordered that any unusual behavior be
4 logged in a logbook kept by guards solely on the accused. On or
5 about 10 December 2010 the accused's TV privileges were taken away
6 because of news reports that he had committed suicide. They were
7 subsequently restored. On 15 December 2010, the accused was provided
8 a safety mattress with a one-piece pillow included. On 2 March 2011,
9 the accused's handling instructions were changed to remove all gear
10 between reveille and taps except his mattress and two POI blankets.
11 On 7 March 2011, the accused received a suicide smock ordered by PSL
12 Branch, Headquarters, Marine Corps.

13 16. The main distinctions in handling instructions between
14 the accused while in SR status and while on POI status are that while
15 the SR -- while the accused was on SR status from 18 to 20 January
16 2011, he was not allowed to keep one book and one set of PT gear
17 shoes during reveille and was not allowed to keep his eyeglasses
18 unless reading or moving outside the cell and was observed 1:1 rather
19 than at 5-minute intervals.

20 17. From 29 July 2010 to 10 December 2011 [sic], the
21 accused was allowed 20 minutes of exercise rather than 1 hour because
22 of his POI status not because of his MAX custody classification. On
23 10 December 2010, after Captain Hocter recommended that the accused

1 receive additional exercise time, CWO4 Averhart changed the accused's
2 handling instructions to 1 hour of recreation/sunshine call without
3 restraints.

4 18. The accused received regular command visits. He told
5 his chain of command he did not understand why he was on POI status
6 during every command visit except 7, 15, 21 October and 12, 10, and
7 26 November 2010. The accused consistently told his chain of command
8 he was treated professionally by the brig guards. He never asked the
9 chain of command to take any action to change his MAX custody or POI
10 status.

11 19. The accused was familiar with DD 510 Request for Interview
12 forms. On 17 November 2010, the accused submitted three DD 510s
13 regarding an LES issue, an inquiry regarding command visits and
14 monitoring, and a request for a subscription to, quote, Scientific
15 American, unquote, magazine. On 22 December 2012, the accused
16 submitted to DD 510 requests for books and an emergency phone call to
17 his defense counsel. The defense did not -- or the accused did not
18 file any DD 510 requests regarding MAX custody or POI status until
19 7 January 2011. The accused also did not raise MAX custody/POI
20 status with Gunnery Sergeant Blenis during the weekly counseling
21 interviews or with the Brig O during his visits to the SQ. Gunnery
22 Sergeant Blenis did not tell the accused Captain Hocter was
23 recommending he remain on POI status during the -- October/November

1 2010. The accused also did not raise his MAX/POI status or otherwise
2 complain about his treatment at the brig with any of his visitors.
3 The accused did not request to speak with other detainees or to eat
4 outside of his cell. On 21 January 2011, the accused told the C&A
5 board that he might need to be placed in protective custody. He did
6 not complain about his pre-15 December 2010 mattress, his post-15
7 December 2010 mattress or his POI blankets to the brig staff or when
8 asked about it during a personal visit on 26 February 2011. Defense
9 counsel began raising the issue of the accused's continuation on POI
10 over mental health recommendations via e-mail on 29 November 2010.
11 Defense counsel sent a memorandum to the Brig O on 5 January 2011
12 requesting reduction of the accused's -- in the accused's
13 classification from MAX to MDI and removal from POI on the grounds
14 that Captain Hocter recommended the accused's status be downgraded
15 from MAX to MDI and recommended that the accused be removed from POI.
16 On 13 January 2011, Mr. Coombs filed a Request for Release from
17 Confinement under R.C.M. 305(g) with Colonel Coffman, the Special
18 Court-Martial Convening Authority, on the same basis. On 14 January
19 2011, the accused advised his chain of command of the 7 January 2011
20 DD 510 request to change his status that had not yet been acted upon
21 by the Brig O. On 19 January 2010 [sic] the accused filed a Request
22 for Redress under Article 138, UCMJ. On 10 March 2011, the accused

1 submitted a rebuttal to the response to his original Article 138
2 complaint.

3 10 -- excuse me -- 20. Captain Hocter recommended that the
4 accused be removed from POI. He never recommended a downgrade of
5 custody from MAX to MDI. Captain Hocter's recommendations to remove
6 the accused from POI stated that 15-minute checks required by MAX
7 custody would suffice. The custody classification decision of
8 MAX/MDI is a Brig 0 decision based on the level of security required
9 for a particular pretrial detainee.

10 21. There was an increase in media, international and
11 nongovernmental organization, and individual member congressional
12 interest in the accused's confinement conditions on or about December
13 2010/January 2011 and -- concurrently with the accused and defense
14 counsel complaints and filings about the accused's MAX/POI custody
15 and status. The brig received numerous requests from outside
16 entities who were not on the accused's approved witness list to come
17 and visit him, to include Mr. Juan Mendez, U.N. Special Rapporteur
18 and Congressman Dennis Kucinich. Such requests were directed to the
19 DoD Office of Congressional Representative -- Legislative Liaison
20 Affairs, not the brig.

21 22. On 27 December 2011, Lieutenant General Flynn called
22 Major General Ary, Staff Judge Advocate to the Commandant of

1 the Marine Corps, stating that while he had the utmost confidence in
2 the way the brig is being run, he wanted to be proactive to ensure
3 the Marine Corps held the high moral -- moral high ground when
4 responding to the media. Subsequent e-mails among HQ, Marine Corps
5 proposed outside visits to the Marine Corps brig by high level DoD
6 officials with corrections expertise and development of fact sheets
7 to compare Marine Corps Brig Quantico standards with DoD, Army
8 Corrections Association, and Bureau of Prisons protocols.

9 23. On 14 January 2011, there was a meeting at Marine
10 Corps Brig Quantico with the staff and Captain Hocter and Captain
11 Moore. Among the issues discussed was Captain Hocter's concern about
12 the accused remaining on POI status. He opined POI was not justified
13 from a medical viewpoint. CWO4 Averhart explained that the medical
14 component was part of the overall classification assessment and the
15 process was continually evaluated. Colonel Oltman and CWO2 Barnes
16 were present at the meeting. The meeting got heated between Colonel
17 Oltman and Captain Hocter. Captain Hocter told the brig staff to
18 call POI something else if they wanted to maintain the accused on
19 that status for security reasons because it was not warranted for
20 psychiatric reasons. Colonel Oltman told Captain Hocter that the
21 accused would remain in POI status and that if keeping him on that
22 status was required to get the accused to trial, that's what they
23 would do.

1 24. On 18 January 2011, the accused had an anxiety attack
2 at rec call -- recreation call. He was being escorted by Lance
3 Corporal Tankersly, Lance Corporal Cline, and GM1 Webb. All of the
4 guards were doing their job properly. They were not harassing the
5 accused. The conduct of the guards had nothing to do with any
6 protest that occurred at Marine Corps Brig Quantico on or before
7 18 January 2011. The accused perceived the guards to be anxious so
8 he became anxious. The accused's anxiety attack was consistent with
9 his history at Fort Drum, FOB Hammer, and Kuwait. The accused
10 recovered and continued his recreation call without incident. Lance
11 Corporal Tankersly and Lance Corporal Cline were replaced for
12 nondisciplinary reasons. After the accused returned to his cell, he
13 was visited by Gunnery Sergeant Blenis, Master Sergeant Papakie, and
14 CWO4 Averhart. They asked how he was doing and questioned him about
15 what happened during the anxiety attack. The accused grew frustrated
16 when discussing the comparison between his anxiety attack and what
17 happened in Kuwait. He put his hands up by his head and began
18 yelling such things as, quote, unquote, Why are you staring at me?
19 and quote, unquote, Why are you yelling at me? CWO4 [sic] placed the
20 accused on, quote, unquote, Special Move/Suicide Risk. The accused
21 initially refused to give his clothes to Master Sergeant Papakie
22 causing CWO4 Averhart to order a Code Blue and order that the accused
23 be videotaped. The accused gave his clothes to Master Sergeant

1 Papakie and continued to argue to both Master Sergeant Papakie and
2 Gunnery Sergeant Blenis that this anxiety attack was different than
3 Kuwait, that he was not suicidal, and that he should not be on POI.
4 Captain Hocter arrived and recommended the accused be taken off SR
5 and placed on POI status for 24 hours. CWO4 Averhart did not take
6 the accused off Suicide Risk until 20 January 2011.

7 25. On 21 January 2011, after being questioned by First
8 Sergeant Williams following his command visit to the accused -- with
9 the accused on 14 January 2011, CWO4 Averhart acted on the accused's
10 DD 510 approving his appearance before the 21 January 2011 C&A board.
11 The accused also appeared before the C&A board on 4 February 2011 and
12 25 February 2011. During his appearance before the board on
13 21 January 2011, three days after his 18 January 2011 anxiety attack,
14 the accused was asked about his intake statement, quote, Always
15 planning, never acting, unquote. The accused advised the board that
16 the statement may have been false. In response to a question of
17 whether the board should then believe his current assurances that he
18 was not suicidal were also false, the accused replied, "They may be
19 false." These statements by the accused caused great alarm to each
20 of the board members and exacerbated their concerns that the accused
21 may be patiently waiting to harm himself.

22 26. On 24 January 2012, the brig changed command from CWO4
23 Averhart to CWO2 Barnes. Colonel Malone replaced Captain Hocter as

1 the primary mental health provider for the accused following Captain
2 Hocter's 18 January 2011 visit with the accused prior to Captain
3 Hocter's deployment. CWO2 Barnes and Colonel Malone had a much more
4 coordin -- had much more coordination regarding the accused's mental
5 health condition and a much better personal rapport than did Chief
6 Averhart and Captain Hocter. Together, they revised the SR/POI
7 Assignment Review mental health forms. CWO2 Barnes also implemented
8 Brig Form 4200.1, January 11, to document the C&A board proceedings.

9 27. Beginning on 21 January 2011, Colonel Malone found the
10 accused had no suicidal thoughts or intent; that he was
11 psychologically cleared to come off POI status. On 28 January 2011,
12 Colonel Malone opined that the accused remained at moderate risk of
13 self-harm, had below average tolerance for frustration, and a limited
14 ability to express or understand his feelings. Colonel Malone opined
15 that the risks and benefits of POI are not further detrimental at
16 this time. Starting on 18 February 2011, Colonel Malone changed the
17 SR/POI Recommendation Form to a Report of Behavioral Health
18 Evaluation Form for the C&A board. This form is similar to the
19 standard mental status examination forms used for mental status
20 examinations. The form contained blocks to assess the accused's
21 behavior, level of alertness and orientation, mood and affect,
22 thinking process, thought content, memory and findings as to the
23 status of the accused's mental disorder, risk for suicide/self-harm,

1 risk for violence, whether the accused has a behavioral disturbance,
2 whether he needs to be segregated from the general population due to
3 a treatable mental disorder, and whether and how frequently the
4 accused needs further examination. Rather than recommending a
5 particular status, Colonel Malone described the accused's current
6 mental health status in the remarks. On 18 February 2011, Colonel
7 Malone found the accused's behavior normal, fully alert and oriented,
8 unremarkable mood and affect, clear thinking process, normal thought
9 content, good memory and found the accused's mental disorder
10 resolved, risk for suicide/self-harm and risk for violence low, and
11 behavioral disturbance was not applicable and the accused did not
12 need to be segregated from the general population due to a treatable
13 mental disorder and that he required routine further examination. In
14 the remarks section, Colonel Malone opined the accused's anxiety
15 disorder remains in early full remission; he is tolerating medication
16 taper off well; he understands the risk and benefit of treatment; and
17 that he responds well to intellectual stimulation. On 4, 8, 11, 18
18 -- and 18 March and 8 April 2011, Colonel Malone checked the same
19 boxes and remarked that the accused's anxiety disorder was in
20 remission, he was completely off his medications, remains at low risk
21 of suicide/self-harm, and that he would benefit from intellectual
22 stimulation.

1 29 -- 28. On 6 and 15 April 2011, Lieutenant Colonel
2 Russell did the mental health assessment of the accused for Colonel
3 Malone. Lieutenant Colonel Russell checked the same blocks as
4 Colonel Malone, except he found the accused's mental disorder stable
5 rather than resolved. After speaking at length with CWO2 Barnes,
6 Lieutenant Colonel Russell opined that the accused presented to him
7 -- that the accused's presentation to him varied significantly from
8 that observed by the brig staff. Lieutenant Colonel Russell opined
9 that the Brig O's decision to maintain due diligence for self-harming
10 behavior was not unreasonable given the accused's recent withdrawal
11 from staff and his refusal to communicate with brig staff to give
12 them assurances of his safety if removed from POI. He further opined
13 that the accused's behavior was likely to persist.

14 29. The withdrawal of the accused from his medication was
15 not listed on the accused's chart until 23 February 2011. CWO2
16 Barnes thought the accused was refusing to take his medication until
17 she spoke with Colonel Malone on 23 February 2011 and learned that
18 because the accused had extra supervision, Colonel Malone was
19 comfortable taking him off his medications. CWO2 Barnes disagreed
20 with Colonel Malone's decision to wean the accused off his
21 medications because of the accused's additional stressors and
22 uncertainty about his future.

1 30. On 2 March 2011, the accused received notice of the
2 current charges, including aiding the enemy, with a possibility of
3 confinement for life without parole or death if a capital referral.
4 He also received Colonel Choike's response denying his Article 138
5 Request for Redress. The Marine Corps Base Quantico's chain of
6 command wanted Colonel Malone available to see the accused to assess
7 his mental health with the arrival of these additional stressors.
8 The accused was observed mumbling in his cell. Colonel Malone could
9 not be located and was on emergency leave. On 3 March 2011, Chief
10 Barnes got in touch with Colonel Malone who arranged to see the
11 accused on 4 March 2011. The Marine Corps brig chain of command was
12 not happy about this. The incident caused Lieutenant General Flynn
13 to fully engage with Captain Neill to coordinate with the Army to get
14 additional mental health support for the accused and for Marine Corps
15 Brig Quantico.

16 31. On 2 March 2011, shortly before taps, Master Sergeant
17 Papakie was advised by a guard that the accused did not understand
18 why he had to give up his clothes except underwear at night. Master
19 Sergeant Papakie spoke with the accused who continued to insist he
20 didn't understand why all of the items are taken except his underwear
21 with the elastic band that is the most dangerous piece. The accused
22 was chuckling briefly as if the conversation was absurd. Master
23 Sergeant Papakie told Chief Barnes of the comment. Chief Barnes --

1 CW2 [sic] Barnes ordered the accused's gear except one mattress and
2 two POI blankets be removed from his cell after taps, to include his
3 underwear, shower shoes, and eyeglasses. CWO2 [sic] cited SECNAVINST
4 paragraph 4-14(d)(5)(B) as authority to remove the accused's
5 underwear. This paragraph applies only to Suicide Risk status, not
6 POI. However, the court finds that SECNAVINST 4-14(a) and (b) give
7 authority to the Brig O to restrict privileges for prisoners in SQ
8 when they must be withheld for reasons of security or safety. This
9 would include authority to remove clothing, including underwear, in
10 cases where the Brig O has reason to believe the clothing was
11 necessary to be removed for security or safety reasons for a period
12 of time that is not excessive in relation to the legitimate
13 government interest in protecting pretrial detainees from self-harm.

14 32. The proper mode of communication from a pretrial
15 detainee to a guard when asking a question was to address the guard
16 by his rank and then ask the question. There was no requirement for
17 detainees to refer to themselves in the third person. The accused
18 was aware of this through indoctrination. The accused did not refer
19 to himself in communications with the staff in the third person as
20 reflected in his 26 February 2011 personal visit when he asked,
21 quote, Lance Corporal, can I turn on the light?, unquote.

22 33. On the morning of 3 March, prior to reveille, the
23 accused's clothes were not in his feed tray. He stood at attention

1 during count naked without covering himself with his POI blanket, as
2 was his normal practice. The accused had never done this before.
3 While in POI status from 11 August 2010 until 2 March 2011, the
4 accused had his clothes removed from taps to reveille except
5 underwear and shower shoes. He stood for count covering himself with
6 his POI blanket. The accused testified he intended to -- he
7 attempted to stand with his POI blanket covering himself and was told
8 by a guard, Is this how you stand at parade rest?, quote, unquote.
9 The accused testified he requested clarification from the guard,
10 asking, Lance Corporal comma -- quote, Lance Corporal, Detainee
11 Manning asks if he has to put the blanket down, unquote. He
12 testified he received a "yes" response and took it as an implied task
13 to drop the POI blanket and stand naked at parade rest and then at
14 the position of attention during count. Nobody from the brig staff
15 ordered the accused to stand naked at the position of attention
16 during count. The brig staff did not consider the incident
17 significant until the 4 March 2011 New York Times article entitled,
18 quote, Soldier in Leaks Case Was Jailed Naked, Lawyer Says, unquote.

19 34. On 3 March 2011, after count, the accused made a
20 telephone call to Mr. Coombs. Mr. Coombs maintains a blog on this
21 case. On 4 March 2011, the accused's clothes were removed from his
22 feed tray prior to reveille -- or, excuse me, on 4 March 2011, the
23 accused's clothes were in his feed tray prior to reveille. Also on

1 4 March 2011, the *New York Times* article was printed, stating in
2 relevant part, quote, A lawyer for PFC Manning has complained that
3 his client was stripped and left naked in his cell for 7 hours on
4 Wednesday, unquote. The article quoted the following taken from the
5 blog. Quote, The Soldier's clothing was returned to him Thursday
6 morning, after he was required to stand naked outside his cell during
7 an inspection. This type of degrading treatment is inexcusable and
8 was without justification. It is an embarrassment to our military
9 justice system and should not be tolerated. PFC Manning has been
10 told the same thing will happen to him again tonight. No other
11 detainee in the brig is forced to endure this type of isolation and
12 humiliation, unquote. From 4 March 2011 to 20 April 2011 the accused
13 was ordered to relinquish all items from his cell except his suicide
14 mattress and two POI blankets. The accused was given a suicide smock
15 to wear starting on 7 March 2011. There is no evidence before the
16 court that the accused was ordered by anyone in the brig to stand
17 outside -- naked outside his cell at any time or to stand naked at
18 any time after the morning of 3 March 2011. On 4 March 2011, the
19 accused's clothes were in his feed tray prior to count.

20 35. On 4 March 2011, Lieutenant Colonel Wright from
21 Headquarters, Marine Corps Law Enforcement and Corrections Branch,
22 Security Division Plans, Policies, and Operations, PSL, the proponent
23 of SECNAVINST 1640.9, wrote an e-mail to Colonel Oltman, saying it

1 was his professional opinion at PSL -- well, excuse me, that it was
2 the professional opinion at PSL that they had concerns about recent
3 decisions made by the Brig O and to take any measures that are
4 inconsistent with -- that are consistent with suicide watch but not
5 officially place that person on a suicide watch status is
6 inconsistent with the way we are supposed to do business, unquote.

7 36. Lieutenant General Flynn knew nothing of the handling
8 instructions regarding the accused until he read about them in the
9 *New York Times* on 4 March 2011. Lieutenant General Flynn was not
10 happy to learn about them this way. He contacted Colonel Choike to
11 relay his intent that any changes in the accused's handling
12 instructions or assignment must be briefed to Colonel Choike and
13 passed on to Lieutenant General Flynn before execution. Lieutenant
14 General Flynn's intent was to ensure he would be prepared to address
15 political impact, media interest, legal ramifications, and senior
16 leadership reaction to any changes in handling instructions. The
17 guidance came after CW2 [sic] Barnes increased the restrictions on
18 the accused. There was no attempt by Lieutenant General Flynn,
19 Colonel Choike, or Colonel Oltman to prevent CW2 Barnes from easing
20 restrictions on the accused or to chill her discretion in making
21 custody or status determinations for the accused.

22 37. Prior to the 4 March 2011 *New York Times* article,
23 Lieutenant General Flynn was coordinating with Headquarters, Marine

1 Corps; HQDA; and mental health chain of command to provide permanent
2 mental health support for both the accused and Quantico brig and for
3 additional assets for Marine Corps Brig Quantico if it continued to
4 serve as a *de facto* regional personnel confinement facility, PCF. He
5 was also coordinating POA -- PAO, Public Affairs Office, regarding
6 confinement conditions of the accused and inviting visits from
7 outside inspectors general and officials with corrections experience
8 to visit Marine Corps Brig Quantico to ensure that the brig was
9 confining the accused properly in accordance with confinement
10 regulations and procedures. Lieutenant General Flynn's guidance
11 after 4 March 211 to Colonel -- 2011 to Colonel Choike was to ensure
12 that he was briefed before any changes to the accused's handling
13 instructions occurred so he would be prepared to fully explain what
14 occurred and why. Lieutenant General Flynn did not intend to
15 influence the decisions of the Brig O regarding the accused's
16 custody, status, or handling instructions. The Brig O did not
17 perceive Lieutenant General Flynn's guidance as a constraint on her
18 discretion.

19 38. On 14 January 2011, Lieutenant General Flynn ordered
20 Colonel Choike to conduct a zero base review of Marine Corps Brig
21 Quantico to assess Marine Corps Brig Quantico's resourcing and
22 viability as a designated Marine Corps Brig -- and desig -- of
23 designating Marine Corps Brig Quantico as a joint or regional PCF

1 with associated funding and manpower. The review found in relevant
2 part that Marine Corps Brig Quantico was not resourced to house long-
3 term pretrial detainees for more than 180 days and was not resourced
4 to house high profile pretrial detainees requiring maximum security
5 with complex mental health issues. The zero base review further
6 recommended that the brig policy provision -- the following brig
7 policy provision changes: (1) the provision mandating detainees in
8 SR/POI receive a custody classification of MAX should be changed to
9 provide that custody and status evaluations be conducted separately;
10 (2) to clarify the authority of a medical officer to determine what
11 protective measures are necessary based on a mental health
12 evaluation, and of a Brig O to impose, or re-impose, additional
13 protective measures based on subsequent behavior; (3) to establish
14 separate Special Quarters and general population quarters; and (4) to
15 ensure that the Brig O returns detainees to the appropriate
16 conditions or quarters when no longer considered to be suicide risks
17 by a medical officer. The SOP should also state that absent
18 additional factors, the Brig O may not place, or return, a detainee
19 to SR status and impose associated protective measures. Ultimately,
20 the zero base review recommended that the confinement facility at
21 Quantico be closed.

22 39. On 20 April 2011, the accused was transferred to the
23 Joint Regional Confinement Facility, JRCF. He was classified MDI and

1 remains at the classification level to date with one disciplinary
2 review board. JRCF does not have POI status.

3 40. After the accused's transfer, PSL -- Headquarters,
4 Marine Corps, PSL sent guidance to the Marine Corps Brig Quantico to
5 ensure that custody and classification were separate determinations.
6 As a matter of correctional practice, similar factors are considered
7 to determine MAX custody and POI status.

8 The Law:

9 1. Article 13, UCMJ, prohibits the imposition of (1)
10 punishment prior to trial and (2) conditions of arrest or pretrial
11 confinement that are more rigorous than necessary to ensure the
12 accused's presence for trial. Prong one involves a purpose or intent
13 to punish determined by examining the intent of detention officials
14 or by examining the purposes served by restriction or condition and
15 whether such purposes reasonably relate -- reasonably relate to
16 legitimate government objective. The second prong applies only when
17 an accused is in pretrial confinement. Prong two examines whether
18 conditions are significantly -- or sufficiently egregious to give
19 rise to a permissive inference that the accused is being punished or
20 the conditions may be so excessive as to constitute punishment.
21 *United States v. King*, 61 M.J. 225, Court of Appeals for the Armed
22 Forces 2005.

1 2. Under both prongs, the burden is on the defense to show
2 that military officials intended to punish the accused or that the
3 restrictions imposed were excessive and otherwise not reasonably
4 related to legitimate government objections -- objectives. *United*
5 *States v. Harris*, 66 M.J. 166, Court of Appeals for the Armed Forces
6 2008.

7 3. Sentence credit is the appropriate remedy for Article
8 13, UCMJ, violations in accordance with R.C.M. 305(k). *U.S. v.*
9 *Williams*, 68 M.J. 252, Court of Appeals for the Armed Forces 2010.
10 Dismissal is also a possible remedy that is rarely appropriate and
11 should be exercised only under the most egregious circumstances so as
12 not to exonerate an accused for reasons unrelated to guilt or
13 innocence and thereby preclude the public's interest in deterring the
14 commission of serious misconduct. *U.S. v. Fulton*, 52 M.J. 767, Air
15 Force Court of Criminal Appeals 2000.

16 4. Conditions of confinement relate to both ensuring the
17 accused's presence for trial and the security and needs of the
18 confinement facility. Military courts should be reluctant to
19 second-guess the security determinations of confinement officials.
20 *United States v. Crawford*, 62 M.J. 411 at 414, Court of Appeals for
21 the Armed Forces 2006. Maintaining security and order and operating
22 the institution in a manageable fashion are particularly within the
23 province and professional expertise of corrections officials, and in

1 the absence of substantial evidence in the record to indicate the
2 officials have exaggerated their response to these considerations,
3 courts should ordinarily defer to their expert judgment in such
4 matters. *Id.*, quoting *Bell v. Wolfish*, 441 U.S.
5 520 at 540, note 23, 1979. The test is (1) is there an intent to
6 punish or stigmatize a person awaiting a disciplinary action; and (2)
7 if not, were the conditions reasonably related -- reasonably in
8 furtherance of a legitimate nonpunitive objection? *United States v.*
9 -- objective *United States v. Starr*, 53 M.J. 380, Court of Appeals
10 for the Armed Forces 2000. The court finds that "reasonably"
11 includes an analysis of whether the restrictions taken by military
12 officials are excessive in relation to the legitimate government
13 interest involved.

14 5. The Eighth Amendment protection against cruel and
15 unusual punishment does not apply to prisoners who have not been
16 convicted and sentenced, or in other words, punished. Pretrial
17 detainees challenging pretrial confinement conditions as unlawful
18 pretrial punishment do so via the Due Process Clause of the
19 Fifth Amendment to the United States Constitution. *United States v.*
20 *Bistrian*, 2012 WestLaw 4335958, Third Circuit 2012. Like
21 Article 13, UCMJ, the Fifth Amendment Due Process Clause protects
22 pretrial detainees who have not been convicted and sentenced from
23 being punished. Conditions reasonably related to a confinement

1 facility's interest in maintaining jail security are not unlawful
2 pretrial punishment. Like Article 13, the test under the Fifth
3 Amendment for whether a particular measure amounts to unlawful
4 pretrial punishment is whether there is an express intent to punish,
5 when the restriction or condition is not reasonably related to a
6 legitimate, nonpunitive government purpose, or when the restriction
7 is excessive in light of that purpose in light of the totality of the
8 circumstances. *Bell v. Wolfish*, 441 U.S. 520 at 19 -- 1979. The
9 court finds that the "excessiveness" in relation to government
10 interest is included in the Article 13 analysis of whether a
11 condition of confinement is reasonably related to a legitimate
12 government interest. The court has not been presented with any
13 evidence that sentence credit is a remedy for Fifth Amendment
14 violations of unlawful pretrial punishment. Dismissal of charges
15 under the Fifth Amendment Due Process Clause is appropriate only when
16 the rare instances when the government has engaged in outrageous
17 conduct. *United States v. Djokich*, 2012 WestLaw 3711536, First
18 Circuit 2012. As such, the court encompasses the Fifth Amendment
19 challenge in its Article 13, UCMJ, findings of fact and conclusions
20 of law.

21 6. Confinement in violation of service regulations does
22 not create a per se right to sentence credit under Article 13, UCMJ.
23 *United States v. Williams*, 68 M.J. 252, Court of Appeals for the

1 Armed Forces 2010 citing *United States v. Adcock*, 65 M.J. 18, Court
2 of Appeals for the Armed Forces 2007. Failure to follow the
3 requirements of a regulation, such as the SECNAVINST as it relates to
4 the conditions of pretrial confinement, is not determinative on the
5 issue of a violation of Article 13. *U.S. v. McCarthy*, 47 M.J. 162 at
6 168, Court of Appeals for the Armed Forces 1997.

7 7. *De minimis* impositions are not cognizable under Article
8 13, UCMJ. *United States v. Corteguera*, 56 M.J. 330, Court of Appeals
9 for the Armed Forces 2002.

10 8. Long-term confinement [**sic**] of a pretrial detainee in
11 MAX custody is not automatically a violation of Article 13.
12 *McCarthy*, 47 M.J. at 168. Even if the accused is confined as a
13 pretrial detainee for a long time, he is not allowed to dictate the
14 conditions of his confinement. *United States v. Willenbring*, 56 M.J.
15 671, Army Court of Criminal Appeals 2001. Decisions to place
16 pretrial detainees into MAX custody status based on arbitrary
17 policies that do not examine the individual circumstances of the
18 accused or based solely on the charges rather than a reasonable
19 evaluation of the facts and circumstances in a case can violate
20 Article 13. *U.S. v. Crawford*, 62 M.J. 411, Court of Appeals for the
21 Armed Forces 2006; *U.S. v. Evans*, 55 M.J. 732, Navy/Marine Court of
22 Criminal Appeals 2001; *U.S. v. Anderson*, 49 M.J. 575, Navy/Marine
23 Court of Criminal Appeals 1998, stating brig policy requiring custody

1 level of MAX for detainees who face more than 5 years' confinement is
2 arbitrary and constitutes unlawful pretrial punishment in violation
3 of Article 13. However, the nature and seriousness of the offense
4 and the potential length of sentence are relevant factors the brig
5 considers -- brig officials may consider in determining custody
6 level. *United States v. Harris*, 2007 WestLaw 1702575, Navy/Marine
7 Court of Criminal Appeals 2007.

8 9. Preventing suicide is a legitimate government interest.
9 *United States v. Williams*, 68 252 [sic], Court of Appeals for the
10 Armed Forces 2010.

11 10. Failure of the accused to contemporaneously complain
12 is strong evidence that Article 13 was not violated. Subsequent good
13 behavior does not serve to revise the facts as they existed and were
14 known to brig authorities. *United States v. Crawford*, 62 at 415,
15 quoting *United States v. Huffman*, 40 M.J. 225 at 227, Court of
16 Military Appeals 1994. However, the fact that an accused or defense
17 counsel does complain does not prove that an Article 13 violation
18 occurred. *United States v. King*, 61 M.J. 225, Court of Appeals for
19 the Armed Forces 2005.

20 11. The views of United States -- United Nations
21 officials, such as the special rapporteur in this case, may serve as
22 a useful interpretative aid, but do not possess the force of law
23 unless Congress has endowed them with such authority and are not

1 controlling of legal determinations in American courts. *INS v.*
2 *Aguirre-Aguirre*, 526 U.S. 415, 1999. There has been no evidence
3 presented that Article 13, UCMJ, was enacted to implement any
4 international obligations of the United States. *Medellin v. Texas*,
5 554 U.S. 759, 2008.

6 Conclusions of Law:

7 1. The defense challenges the periods the accused remained
8 on Suicide Risk over Captain Hocter's recommendation as unlawful
9 pretrial punishment. The government concedes that maintaining the
10 accused on Suicide Risk after a mental health provider determined he
11 was no longer a suicide risk constitutes unlawful pretrial punishment
12 under Article 13. The court agrees. The court [sic] will receive 1
13 day of confinement credit starting the day after Captain Hocter
14 recommended the accused be removed from Suicide Risk. The accused
15 will receive sentence credit for pretrial confinement in violation of
16 Article 13 from 7 through 11 August 2010 and 19 and 20 January 2011,
17 for a total of 7 days.

18 2. From on or about December 2010 until the accused was
19 transferred to the JRCF on 20 April 2011, the accused's conditions of
20 confinement generated a lot of media, nongovernmental organization,
21 international entity, and individual congressional attention.
22 Individuals from these organizations, to include Mr. Mendez, U.N.
23 Special Rapporteur and Congressman Kucinich, requested to visit the

1 accused. Marine Corps Brig Quantico did not deem these as, quote,
2 unquote, official visits and elevated inquiries from such individuals
3 or entities to visit the accused in an unmonitored status to higher
4 headquarters Marine Corps, Army, or Department of Defense. This was
5 appropriate. Neither Mr. Mendez nor Congressman Mr. Kucinich nor any
6 other member of an NGO or international entity were on the accused's
7 visitation list. What, if any, visitation between individual members
8 of international or NGO entities and individual Congressmen acting on
9 their own recognizance is within the executive -- the discretion of
10 the executive branch. There has been no evidence presented that
11 Article 13, UCMJ, was enacted to implement any U.S treaty or other
12 foreign affairs obligation of the United States. The court defers to
13 the agency interpretation of its own regulations. Denial of or
14 monitoring of visits by NGOs, international bodies, or Congressmen
15 acting in their individual capacities is does not constitute illegal
16 pretrial punishment under Article 13, UCMJ.

17 3. The accused was not held in solitary confinement.
18 "Solitary" means alone and without human contact. Although the
19 accused was confined by himself in a similar -- in a cell similar to
20 that of other detainees at Marine Corps Brig Quantico, he had daily
21 human contact. There were no additional doors separating the
22 accused's cell from the main hallway. He could view all activity
23 going on in the hallway. He had weekly visits with his counselor and

1 mental health professionals as well as daily walk-through visits by
2 the Brig O.

3 4. Throughout the duration of the accused's pretrial
4 detention at Marine Corps Brig Quantico, the C&A board met weekly to
5 assess the accused's custody level and classification. Although
6 there was some confusion in the brig policy over whether POI status
7 requires MAX custody, the C&A board independently determined the
8 accused should be detained in MAX custody relying on factors set
9 forth in the SECNAVINST independent of POI, primarily the nature of
10 the accused's offenses, the potential length of sentence, low
11 tolerance for frustration, continuing need for mental health
12 evaluation, and poor family relationships. Gunnery Sergeant Blenis
13 prepared and presented his recommendations as to custody and
14 classification as the accused's counselor while simultaneously
15 serving as the senior board member. Although this procedure was not
16 ideal, the court finds that each member of the C&A board reached his
17 determination independently and the board procedures were conducted
18 and reported within the SECNAVINST guidance. The court further finds
19 that Chief -- CWO4 Averhart and CWO2 Barnes made independent
20 judgments with regard to each of the accused's custody/classification
21 determinations. Although Colonel Oltman concurred with both CWO4
22 Averhart and CWO2 Barnes' determinations, he made no attempt to
23 influence their decisions. Colonel Oltman concurred after the

1 determinations were made. Neither Colonel Choike nor Lieutenant
2 General Flynn attempted to influence the decisions of either CWO4
3 Averhart or CWO2 Barnes with respect to custody or classification of
4 the accused. On 14 January 2011, heated words were exchanged between
5 Colonel Oltman and Captain Hocter. Colonel Oltman stated if
6 necessary for the accused to appear at trial, the accused would stay
7 on MAX/POI while under his watch. By these comments, Colonel Oltman
8 did not attempt to influence CWO2 Barnes in her custody/status
9 decisions. He did not in fact influence her custody and status
10 decisions regarding the accused. Throughout the accused's detention
11 at Marine Corps Brig Quantico, when Colonel Oltman was briefed by
12 CWO4 Averhart or CWO2 Barnes regarding the accused's custody,
13 classification, or handling instructions, the briefing occurred to
14 advise Colonel Oltman of the decisions after they had been made.

15 5. As early as the arrival of the accused, Lieutenant
16 General Flynn's intent was to ensure Marine Corps Brig Quantico was
17 following regulations and procedures properly with common sense in
18 detaining the accused. He wanted to hold the moral high ground.
19 Lieutenant General Flynn was consistently engaging with the mental
20 health chain of command, Headquarters, Marine Corps Corrections, and
21 the Army at the HQDA level to obtain additional mental health to
22 enable Marine Corps Brig Quantico to effectively maintain the accused
23 as a long-term pretrial detainee. As the Senior Mission Commander

1 equivalent of Marine Corps Quantico, Lieutenant General Flynn had a
2 need-to-know of any changes in handling instructions, custody/status,
3 or other confinement conditions for the accused so he was properly
4 prepared to engage and inform higher headquarters, PAO, and others
5 who were informing the public about the Marine Corps Brig Quantico to
6 ensure adequate [sic] information was being relayed about the
7 accused's conditions of confinement.

8 6. There was no intent to punish the accused by anyone on
9 the Marine Corps brig's staff or in the Marine Corps Quantico chain
10 of command. Their intent was to ensure the accused was safe, did not
11 hurt or kill himself, and was present for trial. The Marine Corps
12 brig staff was also concerned about the security of the Marine Corps
13 brig, its staff, and other prisoners there.

14 7. The charges are serious in this case and there was no
15 intent to punish the accused. Dismissal of charges is not an
16 appropriate remedy for any Article 13, UCMJ, violations in this case.

17 8. Preventing a pretrial detainee from injuring or killing
18 himself is a legitimate government interest. The use of POI as a
19 status is a reasonable tool for advancing that interest. Unlike SR,
20 where the decision to remove is made by the medical officer, the
21 SECNAVINST leaves the POI removal decision to the Brig O. In this
22 case, the accused was held in long-term POI status based largely on
23 his mental health history and his mental health condition with

1 restrictions approaching those of Suicide Risk. At some point,
2 continuing POI over the recommendation of mental health professionals
3 becomes excessive in relation to the legitimate government interest
4 absent changes in circumstances.

5 9. With respect to CWO4 Averhart -- the CWO4
6 Averhart/Captain Hocter tenure, there was no meaningful engagement
7 between the brig staff and Captain Hocter. The brig staff did not
8 trust Captain Hocter. Captain Hocter recommended the accused be
9 removed from POI on 27 August 2010. The Brig O had discretion to
10 maintain the accused on POI after that recommendation for a
11 reasonable period of time. The reasonableness of time includes
12 consideration of the accused's history of suicidal ideation and
13 violent behavior in Kuwait, the ambiguous statements made by the
14 accused regarding suicide as an option indefinitely, and the
15 accused's continued guarded communication with brig staff. The court
16 finds that continued maintenance of the accused on POI status over
17 mental health recommendation after 1 November 2010 was excessive in
18 relation to the legitimate POI interest resulting in the accused
19 being held in conditions more rigorous than necessary except for the
20 period of 10 through 13 December 2011 where CPT Hocter recommended
21 the accused remain on POI. The court will award 1 day of sentence
22 credit from 1 November to 17 January 2012, minus those 3 days for a
23 total of 75 days.

1 10. The accused's panic attack on 18 January followed by
2 his comments on 21 January 2011 and 2 March in light of his behavior
3 and comments in Kuwait caused reasonable concern for the brig staff.
4 Continuing the accused on POI, notwithstanding the recommendations
5 from mental health professionals, was not excessive in relation to
6 the legitimate government interest in preventing the accused from
7 injuring himself or others. There was no Article 13 violation from
8 18 January through 3 March and a reasonable period thereafter --
9 2011.

10 11. CWO2 Barnes had authority to remove the accused's
11 underwear when he made a direct comment about the ability to commit
12 suicide with the waistband. However, this removal does approach
13 Suicide Risk restrictions, and at some point the accused's comment
14 must -- comments must be considered in context and in connection with
15 his mental health diagnosis even if brig officials disagree with the
16 diagnosis/treatment plan of the mental health professional. The
17 court sets that point at 1 April 2011. Maintaining the accused in
18 POI status over the recommendations of mental health professionals
19 when his mental health condition was in remission and without
20 considering the context of the 2 March 2011 communications by the
21 accused became excessive in relation to the legitimate government
22 interest. This decision is a very close call. In March/April 2011,
23 the accused removed visitors from his visitation list, withdrew

1 completely from communications with brig staff even after being
2 advised that if he provided assurances to the Brig O and explanations
3 of his behavior he would be -- he could be taken off POI status, was
4 engaging in a subtle increase in rules violation, and was not
5 truthful in statements to Lieutenant Colonel Russell. These factors
6 are balanced by the fact that the Brig O was aware that the accused
7 believed his comments of 21 January 2011 and 2 March 2011 were being
8 used against him to continue his POI status and the history of
9 maintaining the accused on lengthy POI status without meaningful
10 mental health provider input. The court will grant day-for-day
11 sentence credit from 1 April -- 1 to 20 April 2010, for a total of 20
12 days.

13 12. Although the SECNAVINST does not affirmatively state
14 that 1 hour is required exercise time for all prisoners, the
15 testimony from CWO5 Galaviz, CWO2 Barnes, and Lieutenant Colonel
16 Hilton, as well as the Disciplinary Segregation section of the
17 SECNAVINST and Marine Corps Brig Quantico policy indicate that 1 hour
18 of exercise is the standard for all prisoners unless limited because
19 of prisoner behavior or staff resource constraints. The court finds
20 neither existed to systematically limit the accused to 20 minutes of
21 exercise call from 29 July 2010 to 10 December 2010. This violation,
22 although not *de minimis*, is minor. One for one day sentence credit

1 is excessive and disproportionate to the Article 13, UCMJ, violation;
2 the court grants 10 days of sentence credit.

3 13. Any comments that may be perceived as derogatory
4 statements made about the accused in e-mails between the brig staff
5 are *de minimis*, were not communicated to the accused or any other
6 prisoner, and were not humiliating to the accused. No sentence
7 credit is warranted.

8 14. Monitoring the accused's communications and visitation
9 under circumstances where the accused is charged with disclosing a
10 huge volume of classified information is a legitimate government
11 interest and does not violate Article 13.

12 15. The court recognizes that R.C.M. 305(k) could provide
13 an independent basis for additional credit. *United States v.*
14 *Williams*, 68 M.J. 252, Court of Appeals for the Armed Forces 2010.
15 Having considered the totality of the circumstances as set forth
16 above, R.C.M. 305(k) and the granted Article 13 credit, the court
17 does not believe additional credit is warranted.

18 Ruling: The accused will be granted with 112 days of
19 sentence credit for Article 13 punishment.

20 So ordered this 7th day of January 2013.

21 And that will be at the next appellate exhibit, which is?

22 CDC[MR. COOMBS]: Your Honor, I believe we might have an
23 appellate exhibit that's been marked twice, so I wanted to --

1 [conferred with court reporter] -- so we have one exhibit, Your
2 Honor, that was marked twice, and the second time it was marked was
3 at Appellate Exhibit 461, so if this is marked -- the court's ruling
4 is marked as Appellate Exhibit 461, then that would eliminate that.

5 MJ: All right, does the government have any objection?

6 TC[MAJ FEIN]: No, Your Honor. I assume the defense is talking
7 about Appellate Exhibit 456 is the same as 461.

8 CDC[MR. COOMBS]: That's correct.

9 MJ: All right, why don't we do that then; this will be ----

10 TC[MAJ FEIN]: And -- I'm sorry, Your Honor -- just one other -
11 - there's a clerical issue. I don't if -- not substantive with your
12 ruling. When you talked about Captain Webb around page 6, you said
13 "U.S. Navy captain." It is actually a U.S. Marine Corps captain.

14 MJ: Oh, yes, Marine Corps captain, okay. My purpose in that
15 was distinguishing between C-A-P-T, the O-6 level captain, versus the
16 O-3 level captain.

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: All right, Marine Corps captain, thank you.

19 As is evident, I have several typos to fix, so I will do
20 that as well.

21 Is there anything else we need to address today?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: All right, what time would you like to start tomorrow
2 morning?

3 CDC[MR. COOMBS]: If we could start at 1000, Your Honor?

4 TC[MAJ FEIN]: May I have a moment, Your Honor?

5 MJ: Yes.

6 [The trial counsel conferred with co-counsel.]

7 TC[MAJ FEIN]: 10 is fine, Your Honor.

8 MJ: All right, court is in recess until 10 o'clock tomorrow
9 morning.

10 [The Article 39(a) session recessed at 1607, 8 January 2013.]

11 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1117, 9 January 2013.]

2 MJ: This Article 39(a) session is called to order.

3 Let the record reflect all parties present when the Court
4 last recessed are again present in court.

5 First off, I received the e-mails that were sent last night
6 by the parties with respect to the Bachelor case for Article 104. I
7 will certainly consider that case as well as the commentary in the e-
8 mails when I am looking at the motive motion.

9 Does either side desire to address this?

10 CDC[MR. COOMBS]: No, Your Honor.

11 TC[MAJ FEIN]: No, Your Honor.

12 MJ: All right. I have one additional finding for the Article
13 motion that I made yesterday, and that is that the brig O's
14 decision to maintain the accused in max custody throughout his
15 confinement at military -- Marine Corps Brig Quantico was based on
16 the individualized consideration of the accused and the SECNAV
17 Instruction factors. This was neither an abuse of discretion or a
18 violation of Article 13.

19 Today the government has filed a request for leave until 8
20 February 2013, to submit its plan for storing any Appellate Exhibits
21 not accompanying the record of trial. Just for the record, I had
22 ruled orally granting the government an extension already until 10
23 January 2013. Major Fein, would you like to address this?

1 TC[MAJ FEIN]: Yes, ma'am. What has been marked as Appellate
2 Exhibit 463 - on 7 January of this week the United States submitted
3 its written storage plan for final approval to the Office of the
4 Clerk of the Court for them to do their final sign off. When we did
5 that although we've been coordinating for the last 2 months with the
6 Office of the Clerk of Court. The Clerk of the Court actually
7 decided that it would be best to get input from the Defense Appellate
8 Division Chief and from the leadership at the U.S. Army Legal
9 Services Agency. On behalf of -- well, the Clerk of the Court asked
10 that the prosecution could ask for more time in order to properly --
11 to give the clerk more time to vet the plan with the leadership and
12 therefore the government has requested that time until 8 February,
13 Your Honor.

14 MJ: All right. Any objection?

15 CDC[MR. COOMBS]: No, Your Honor.

16 MJ: All right. This is not an issue that has anything to do
17 with the trial schedule, so the Court is going to grant the
18 government's motion for leave until 8 February 2013.

19 Counsel and I met in an R.C.M. 802 conference this morning.
20 If everyone will notice the trial got started a little bit late
21 today. There were a lot of logistics issues that the government and
22 the defense had been conferring about before we met in the R.C.M. 802
23 conference. A lot of it involved scheduling. We will have some

1 changes in the trial calendar. Those changes are not actually
2 complete right now, but we do have some firm dates. There may be
3 some more additional dates and suspenses plugged in there. I'm going
4 to meet with counsel after we're completed with these proceedings to
5 work further out some of those logistics.

6 For the record, the next proceeding on the 16th and 17th of
7 January is the same. The speedy trial argument will occur on those
8 dates.

9 Major Fein, if you would like to summarize what the parties
10 conferred about and the trial calendar changes to date.

11 TC[MAJ FEIN]: Yes, ma'am. The parties met this morning prior
12 to meeting with the Court and then reiterated the conclusions or
13 findings that both sides agreed upon with the Court. This was in
14 reference to Military Rule of Evidence 505(h) notice, defense notice
15 of what classified information it intends to use at trial.

16 Prior to our discussion there were multiple filings, Your
17 Honor, that occurred by both parties since the last session. The
18 first, Your Honor, on 14 December 2012, what's been marked as
19 Appellate Exhibit 450 was the defense's notice under M.R.E. 505(h).
20 What has been marked as Appellate Exhibit 454 is the government's
21 response to the defense M.R.E. 505(h) notice on updated government
22 witness list number two that was filed on 21 December 2012.

1 What was mentioned yesterday, what's been marked as
2 Appellate Exhibit 455 was a government's notice to the Court of
3 inability to comply with paragraph 2(c) of the Court's scheduling
4 order for Grunden that was filed on 21 December 2012.

5 What has been marked as Appellate Exhibit 458 was the
6 defense's response to the government's notice of its inability to
7 comply with paragraph 2(c) of the Grunden order.

8 Also, what's been marked as Appellate Exhibit 457 is
9 defense's reply to the government's response to the defense's M.R.E.
10 505(h) notice dated 4 January 2013.

11 The parties met this morning, Your Honor, to discuss M.R.E.
12 505(h) notice in light of the 18 October 2012, filing by the
13 government. The conclusions by both sides were that based off the
14 number of agencies, witnesses and documents and evidence that both
15 sides intend to use during this trial, that the defense would need
16 some more time in order to complete the interviews and provide that
17 505(h) notice. The government absolutely supports that, and so the
18 timeline that both parties came up with was that the final 505(h)
19 notice from the defense would be submitted on 22 February of 2013.
20 Although, as different organizations are completed, the defense
21 submits those in a rolling fashion and the prosecution will process
22 them as we receive them.

1 MJ: For the record, how many -- what's the period of time the
2 government envisions necessary to process these filings?

3 TC[MAJ FEIN]: Yes, ma'am. The government, from the start of
4 this trial, has envisioned for a standard notice for classified
5 information 45 to 60 days. The planning factor we've used here is 60
6 days on the long end. If the filings are done by 22 February, the
7 government's 505 response filings, including the *Grunden* requirements
8 under paragraph 2(c) alternatives that the Court has ordered would be
9 due on 22 April 2013.

10 We would have -- the defense would have a response to those
11 filings due on 6 May 2013. The government would have reply to those
12 responses, if at all, on 11 May 2013. The Article 39(a) session for
13 any outstanding M.R.E. 505 issues and *Grunden* for defense evidence
14 would be held between 21 and 24 May 2013. Based off of that last
15 motions hearing, the new trial date would be set for 3 June 2013.

16 Let me ask a question, we can talk about this later, since
17 the reply is coming in on the 11th of May, was there a reason that
18 the 21 through 24 May date was set as opposed to maybe a week
19 earlier?

20 CDC[MR. COOMBS]: Ma'am, as I recall it's just the routine
21 amount of time that we go from the last filing to the actual 39(a)
22 sessions.

1 TC[MAJ FEIN]: The reason is is that 11 May is a Saturday and so
2 21 May is the Tuesday of the following week. It's to give the Court
3 a full week to ----

4 MJ: Okay. Got it. And the trial date would be?

5 TC[MAJ FEIN]: Sorry, ma'am. The trial date would be 3 June,
6 Monday, 3 June, 2013.

7 Also, ma'am, during this time it would allow both parties,
8 if the parties desired, to work together for any stipulations of
9 expected testimony.

10 MJ: Now, one of the other things that was discussed -- well,
11 first all, Mr. Coombs, do you agree with everything that Major Fein
12 said?

13 CDC[MR. COOMBS]: Yes, Your Honor. Yes, I do, Your Honor.

14 MJ: Do you have anything else to add?

15 CDC[MR. COOMBS]: The only other date we didn't add was the 27
16 February to 1 March, but that can be out at a later date, ma'am.

17 MJ: All right. For the record, that's my next plan is to put
18 that out now. I told you earlier we're going to have the same
19 session that we had originally scheduled on the 16th and 17th of
20 January, which would be the speedy trial argument. The next date on
21 the Court calendar was scheduled to be the 5th through the 8th of
22 February. That will be no longer -- that will no longer be a court
23 date. The accused's plea as well as additional issues that were

1 scheduled for that date are going to move to the next scheduled court
2 date, which was 27 February through 1 March.

3 Government, one thing we may -- one thing we may want to
4 look at is the 27th is a Wednesday. We may want to look at backing
5 that up to the 26th.

6 TC[MAJ FEIN]: Yes, ma'am. We might as well just start planning
7 the 26th. We originally had it for 4 days.

8 MJ: Any objection to that?

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: So it will be 26 February will be the start of that: 26
11 February to 1 March of 2013, and then that will be followed by the
12 dates that Major Fein just discussed. Again, when I speak with the
13 parties, there may be an additional date in there. We'll know the
14 final court calendar by -- when we next convene on the 16th of
15 January.

16 So 16/17 January followed by 26 February through 1 March,
17 followed by 21 through 24 May. Is that correct?

18 CDC[MR. COOMBS]: Yes, Your Honor.

19 TC[MAJ FEIN]: Yes, Your Honor.

20 MJ: All right. One thing the parties may want to look at is if
21 we need to schedule just an additional Article 39(a) session, maybe a
22 short one somewhere in between -- there's a pretty big gap there

1 between the March and the May just in case we've got some issues that
2 arise.

3 TC[MAJ FEIN]: Yes, ma'am. We'll look at that during lunchtime.
4 MJ: I also received this morning a note -- well, first of all,
5 before we get there, is there -- the pleadings that the government
6 just described, asked for a lot of things from the Court. Based on
7 that discussion that you all just had and the agreed upon suspense
8 dates and trial dates, is there anything further that we need to
9 address or litigate with respect to the filings that Major Fein just
10 described?

11 TC[MAJ FEIN]: No, ma'am.

12 ADC[CPT TOOMAN]: Ma'am, from the position of the defense during
13 its conversation with the government this morning there are certain
14 things that we agreed to do with respect to an M.R.E. 505(h) filing
15 in the near term to clear up a matter of ambiguity in a couple of our
16 recent notices. We'll do that before the week is out.

17 TC[MAJ FEIN]: Yes, Your Honor. And the government owes
18 clarification of one government organization and access to those
19 witnesses and we committed to providing that to the defense as soon
20 as possible.

21 MJ: All right. So with respect to those motions, does either
22 side desire any further action from the Court?

23 TC[MAJ FEIN]: No, Your Honor.

1 ADC[CPT TOOMAN]: No, ma'am.

2 MJ: All right. Also, this morning I received a revised defense
3 notice of plea and forum.

4 Mr. Coombs, would you like to address that?

5 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, this morning
6 the defense provided to the Court and government and Appellate
7 Exhibit 464. It's a revised notice of plea and forum. It
8 essentially captures the previous offers of pleas to the lesser-
9 included for the 793 offenses and the outcomes based upon the Court's
10 rulings with regards to our previous proffers for LIOs. Now, in
11 addition to that it offers a plea to Specification 13 and 14 of
12 Charge II, which are the 18 U.S.C. 1030(a)1 offenses, but in this
13 case to the LIOs of those, at least what we are proffering as LIOs.

14 In addition to that it also details what we believe to be
15 the maximum punishment for both of those specifications and the basis
16 for that. Based upon that, we've provided this notice to the Court
17 and the government in order for the Court and government to plan a
18 way forward.

19 MJ: All right. So with respect to the additional two
20 specifications, Specification 13 and 14 of Charge II that when
21 charged in its totality was also charging a violation 18 United
22 States Code Section 1030(a)1. The lesser-included offense, as I
23 understand the defense's proffer, is the same as for the lesser-

1 included offenses for the 793(e), lesser-included offenses
2 specifications that's Army Regulation 380-5, dated 29 September 2000,
3 information security program establishes the custom of the service
4 penalizing disclosures of classified, sensitive information;
5 therefore, the maximum punishment would be reduction to the grade of
6 E1, total forfeiture of all pay and allowances, confinement for 2
7 years and a dishonorable discharge for each specification?

8 CDC[MR. COOMBS]: That is correct, Your Honor.

9 MJ: So the maximum punishment then should the Court accept all
10 of the accused's plea would be reduction to the grade of E1, total
11 forfeiture of all pay and allowances, confinement for 20 years and a
12 dishonorable discharge, correct?

13 CDC[MR. COOMBS]: That is correct, Your Honor.

14 MJ: Government, did you want some additional time to review
15 this and decide if you want to have any kind of objection?

16 ATC[CPT MORROW]: That's correct, Your Honor. We'd ask that
17 we either get back to the Court tomorrow or at the next session, 16
18 January, after the speedy trial.

19 MJ: Why don't we just make it 16 January?

20 ATC[CPT MORROW]: Yes, ma'am.

21 MJ: Please have that built into the trial calendar.

22 ATC[CPT MORROW]: Yes, Your Honor.

1 MJ: Are there any other housekeeping issues or supplements to
2 the R.C.M. 802 conference that we just had?

3 CDC[MR. COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: No, Your Honor.

5 MJ: Are the parties ready to proceed with the judicial notice
6 motions?

7 TC[MAJ FEIN]: Yes, Your Honor.

8 MJ: Let's begin with the government.

9 ATC[CPT MORROW]: Actually, Your Honor, the parties have
10 discussed it and the defense is going to go first. The government
11 actually was going to request that they -- after the defense was done
12 request a 5-minute break to print something.

13 MJ: That's fine. Which one do you want to do, first?

14 ADC[CPT TOOMAN]: Ma'am, we will begin with the over-
15 classification if that's okay with you.

16 MJ: That's fine.

17 ADC[CPT TOOMAN]: Ma'am, the defense believes that judicial
18 notice of the requested documents on over-classifications is proper
19 in this case. The defense will rely on Mr. Coombs's argument from
20 yesterday as to the relevance. I don't think it's necessary to go
21 over that again as to why it's necessary -- or why it's relevant. So
22 today I'll just ----

1 MJ: Let me ask you one more question, just like I asked you
2 yesterday, for the over-classification document that you have, are
3 you asking that I take judicial notice that they exist, or take
4 judicial notice of what's in them?

5 ADC[CPT TOOMAN]: What is in them, Your Honor.

6 MJ: Okay.

7 ADC[CPT TOOMAN]: We feel that the relevance argument has
8 already been made by Mr. Coombs, so we'll rely on that. What I will
9 focus on are just the hearsay exceptions where applicable and then I
10 guess I'll begin with HR 553, which we think falls squarely under
11 M.R.E. 201(a). It is a law that has been passed and signed off by
12 the President, so it's appropriate for judicial notice. I think
13 that's pretty straight forward.

14 I'll address the issue of legislative fact versus
15 adjudicative fact that the government brought up. I would direct the
16 Court to the analysis of 201(a). In there the analysis talks about
17 how there are some procedural requirements that may be -- the Court
18 should go through if it's a legislative fact, but when you're in the
19 sphere of 201(a), it's up to the Court's discretion whether or not
20 you follow those things.

21 The defense would also point out that, and it's A22-5 in
22 the Manual, ma'am.

23 MJ: Mm-hmm.

1 ADC[CPT TOOMAN]: That provision or that discussion in the
2 analysis only applies if the law includes only legislative facts. The
3 defense's position is while the law in this case may include some
4 legislative facts, it's not only legislative facts. Because there
5 are adjudicative facts in the law, it's appropriate for judicial
6 notice.

7 As far as the statements from Mr. Blanton ----

8 MJ: Well, what facts in the law are adjudicative and what facts
9 in the law are legislative?

10 ADC[CPT TOOMAN]: The defense's position would be that they
11 are adjudicative facts. I suspect that the government would disagree
12 with that.

13 MJ: So they're all adjudicative facts?

14 ADC[CPT TOOMAN]: That would be our position. I'm sure they
15 will have an argument for why some of them are legislative facts, but
16 it's our position that they are adjudicative. Even if they are
17 adjudicative, Your Honor -- sorry. If they are legislative, it
18 doesn't matter under the discussion of 201(a), because they're not
19 exclusively legislative facts. Judicial notice would be appropriate.

20 The comments for Mr. Blanton, we think that 803(8)(a) is
21 the appropriate hearsay exception from his testimony. Again, that
22 was before Congress. This Court ruled on a previous judicial notice
23 motion on October 18th, that if relevant, congressional testimony

1 could be admissible under that exception. Again, we'll rely on the
2 relevance argument from yesterday. So if the Court finds over-
3 classification relevant and you think it would be appropriate to take
4 judicial notice of Mr. Blanton's comments as well as the
5 congressional hearing attachment as well.

6 MJ: Even if over-classification by itself could be relevant,
7 why is the -- why are the individual views of people testifying
8 before Congress relevant?

9 ADC[CPT TOOMAN]: Your Honor, those are relevant because these
10 are individuals who have expertise in the area. They're obviously
11 experts because they've been asked by Congress to come testify as
12 they're hashing through this issue. If Congress views them as, you
13 know, an expert on the issue, than their opinion would be, from the
14 defense's prospective, a valuable one. Subject to any further
15 questions on over classification, ma'am.

16 MJ: No, I think I've got the issues. Thank you.
17 Government?

18 ATC[CPT MORROW]: Your Honor, the government asks that you
19 deny the defense motion to take judicial notice of the over-
20 classification materials. We'll begin with ----

21 MJ: Well, before we get there, defense is moving for both
22 merits and sentencing on those?

23 ADC[CPT TOOMAN]: Yes, ma'am.

1 MJ: Okay. Go ahead.

2 ATC[CPT MORROW]: I think the argument is the same, Your

3 Honor. It's essentially a relevance argument. HR 553 is a domestic

4 law, but it is not a fact of consequence to the determination of the

5 action in this case. Specifically, the law could not have affected

6 the state of mind of the accused as it was signed in December 2010.

7 Additionally, M.R.E. 201(a) does not permit the taking of judicial

8 notice of certain statements or findings within a law.

9 As for the Congressional testimony of Thomas Blanton, you

10 did rule in your last judicial notice ruling that Congressional

11 record could be admissible under M.R.E. 803(8)(a) if relevant. The

12 government maintains that the Congressional record in this case,

13 specifically Mr. Blanton's testimony, is not relevant because it

14 consists entirely of Mr. Blanton's opinions on over-classification.

15 The statement reflects his personal conclusions and additionally the

16 personal conclusions of others, which would be hearsay within

17 hearsay. The government maintains that that would be irrelevant on

18 both merits and sentencing.

19 Those opinions belong -- expressed belong to Mr. Blanton

20 and Mr. Blanton alone and have no bearing on the accused's state of

21 mind at the time of the misconduct. Moreover, that testimony

22 discusses over-classification generally and was delivered after the

1 accused's misconduct and does not speak at all to the evidence in
2 this case.

3 MJ: Did HR 553 change anything about the way original
4 classification authorities -- the procedures for original
5 classification authorities to classify information?

6 ATC[CPT MORROW]: I don't believe so, Your Honor. It did not
7 amend the Executive Order 13526 or any proceeding. It was -- as I
8 understand HR 553, it was really a directive to DHS, Department of
9 Homeland Security, to work on ways to ensure that information was not
10 over classified and that it was shared appropriately between law
11 enforcement agencies, both at the state and federal levels.

12 MJ: Why wouldn't it be relevant for sentencing?

13 ATC[CPT MORROW]: Again, Your Honor, I think it wouldn't be
14 relevant for sentencing because it occurred after the accused's
15 misconduct, those hearings. Additionally, it didn't address the
16 over-classification of any information that's part of this case, Your
17 Honor. Frankly, it's the -- the testimony itself is so general as to
18 be unhelpful to the Court.

19 MJ: All right.

20 ATC[CPT MORROW]: As for the House of Representative hearings
21 from 2007, those proffered transcripts document the activities of
22 Congress. Excuse me, sorry, Your Honor.

1 I'm sorry, the Congressional hearings, again. You ruled
2 earlier a Congressional record could be admissible under 803(8)(a) if
3 relevant. When we're talking about the 2007 congressional hearings,
4 we are really talking about a record that consists almost entirely of
5 statements made by members of Congress, various state and federal
6 officials relating to the apparent over-classification of
7 information. Those statements and personal opinions of various
8 officials regarding their perspective on over-classification
9 information, in general, is irrelevant to any issue of material
10 factor in the merits or sentencing. Again, as with Mr. Blanton's
11 testimony, it does not speak at all to the charged information in
12 this case. Further, there is no evidence that the accused was aware
13 of any over-classification issue, if any.

14 I would refer the Court back to its own ruling on judicial
15 notice, specifically the way it ruled with respect to the statement
16 made by Representative Conyers that the defense sought to have
17 admitted under M.R.E. 803(8)(a). At a previous session you ruled
18 that that -- those personal opinions on the Espionage Act and on the
19 government over reactions to leaks, was irrelevant. I would ask that
20 -- the government asks the Court to rule in the same way in this
21 case.

22 MJ: What's the government's position with respect to Mr.
23 Coombs's argument yesterday on M.R.E. 608(c), extrinsic evidence?

1 ATC[CPT MORROW]: Exploring bias, Your Honor?

2 MJ: Yes.

3 ATC[CPT MORROW]: Can I have one moment, Your Honor?

4 MJ: Yes.

5 [Pause.]

6 ATC[CPT MORROW]: I guess the government would reiterate, Your
7 Honor, that there's no evidence of over-classification in this case;
8 and therefore, the use of any extrinsic evidence of over-
9 classification generally would necessarily speak to the bias of any
10 particular OCA in this case.

11 MJ: What's the government's position on the defense using HR
12 553 to cross-examine an OCA?

13 ATC[CPT MORROW]: Again, Your Honor, I would reiterate that
14 that would not be proper evidence of bias.

15 MJ: Why?

16 ATC[CPT MORROW]: The problem of over-classification -- first
17 of all, I'd have to go back to the actual law itself. I mean, the
18 title of the law -- I have to pull it up. The government would
19 maintain that the actual title of the act is a bit misleading.
20 Although it's called the reducing over-classification act, really the
21 substance of the law is the acknowledgement by members of Congress
22 and ultimately the President that there is a problem -- there is an
23 information sharing problem with respect to law enforcement agencies,

1 DHS and state federal authorities, in the context of what occurred on
2 9/11 and acts or attempted terrorist attacks on the country.

3 MJ: All right. Thank you.

4 ATC[CPT MORROW]: Thank you, Your Honor.

5 ADC[CPT TOOMAN]: Thank you, Your Honor. If I may, I'll just
6 touch on a couple of things that Captain Morrow addressed.

7 The first, I guess, would be the timeliness of, I guess,
8 when this law was passed and defense would just point to Attachment A
9 to the motion, which lays out that this was in the public discourse
10 well before any of the charged misconduct here.

11 MJ: It was introduced in January 2009, is that it?

12 ADC[CPT TOOMAN]: Yes, Your Honor. So subject to any questions
13 you have on that, I'll move to damage assessments.

14 MJ: Before you do that, Captain -- I need to ask Captain Morrow
15 one question and I neglected to that on the distinction between
16 legislative and adjudicative facts.

17 ATC[CPT MORROW]: Your Honor, the government can see that that
18 distinction is rather difficult to understand, but essentially
19 legislative facts would be the type of fact that would contribute to
20 the legal reasoning or the making of a law. In this case the facts
21 that the -- specifically, the facts that the defense seem to be
22 interested in are the findings of fact in the beginning of the HR
23 553, which of course, contribute to the laws enacted. The government

1 would say that those were legislative at that time are necessarily
2 appropriate for judicial notice.

3 MJ: And you're talking about here they're Attachment B, the
4 findings.

5 ATC[CPT MORROW]: One moment, Your Honor.

6 [Pause.]

7 ATC[CPT MORROW]: That's correct, Your Honor. Attachment B, the
8 first page, the findings, "Congress finds the following..."

9 MJ: And if I understand the government's position right, the
10 attachment D -- Attachment C and D, what's the government's position
11 with respect to those? Are they legislative facts, adjudicative
12 facts or no facts?

13 ATC[CPT MORROW]: They're not facts, Your Honor.

14 MJ: Thank you. Captain Tooman, would you like to address
15 anything I just raised with the government?

16 ADC[CPT TOOMAN]: No, Your Honor.

17 MJ: Okay.

18 ADC[CPT TOOMAN]: Your Honor, the defense's motion for
19 judicial notice of the damage assessment is Appellate Exhibit 397,
20 Government's response is 432. The defense has three theories of
21 admissibility for the damage assessments. The first theory is under
22 803(d)2(d), the admission of a party opponent. Here the defense
23 turns to ----

1 MJ: You're looking for me to take judicial notice that
2 everything in there is an adjudicative fact, everything in the damage
3 assessment. If it's admissible as an admission by a party opponent,
4 that's different than taking judicial notice that these things are
5 factual. I guess I'm wondering how do we get from the leap to
6 admissibility as a party opponent to my taking judicial notice of the
7 substance of the damage assessment?

8 ADC[CPT TOOMAN]: I'm not sure I understand your question,
9 Your Honor.

10 MJ: There's a difference between me taking notice that the
11 damage assessments exist. Yes, I notice that A, B and C exist;
12 therefore, you can consider them. In my taking judicial notice of
13 them as an adjudicative fact, they are actually factual.

14 ADC[CPT TOOMAN]: Yes, Your Honor. The defense's position is
15 that the damage assessments are a compilation of facts collected by
16 various government agencies. That's the defense position. We think
17 the inquiry is is there -- obviously they're hearsay, so if they're
18 hearsay, what exception is there. We think the Court has already
19 ruled they're relevant based on the discovery process, so we look to
20 the hearsay exceptions.

21 MJ: Okay.

22 ADC[CPT TOOMAN]: I don't know if that answers you're
23 question, Your Honor.

1 MJ: It doesn't, but go ahead.

2 ADC[CPT TOOMAN]: Okay. Well, I guess, Your Honor, the
3 defense's position is those are facts. Those damage assessments
4 contain facts. It's an after the fact look at what has happened.
5 This happened. We're Agency A and this is what has happened.

6 MJ: Well, what's the difference between that and say a DNA
7 analysis or something like that? A Court would never take judicial
8 notice of a DNA analysis that that is factual, this is exactly what
9 happened. That's a question for the trier of fact.

10 ADC[CPT TOOMAN]: Can I have a moment, Your Honor.

11 MJ: Yes.

12 [Pause.]

13 ADC[CPT TOOMAN]: Your Honor, I think -- the defense believes
14 the distinction is that this is a statement by a party opponent and
15 that's a -- a DNA test would not be a statement by a party opponent.

16 MJ: Okay.

17 ADC[CPT TOOMAN]: The reason we feel -- the defense believes
18 this is a statement of party opponent is the court determined that
19 they are a party opponent or they are adverse or closely aligned with
20 the government. I believe that that makes them a party opponent.
21 Then going through the three step -- or the three factor test the
22 Court adopted from *Branum*, obviously this is a position inconsistent
23 -- the government is going to take an inconsistent position. The

1 defense is going to say there was no damage; the government is going
2 to say there was damage. That's an obvious inconsistency between our
3 two positions.

4 MJ: So I'm going to take judicial notice as fact that there was
5 no damage?

6 ADC[CPT TOOMAN]: If that is what was concluded by a party,
7 the allegedly aggrieved party. If you're Agency A and you're a party
8 opponent and you say, "Nothing happened," yes, the defense's position
9 is that's appropriate for judicial notice.

10 The second factor, the indicia of reliability. Again,
11 these are assessments created internally by these organizations.
12 These organizations have every incentive to do a good job, honestly
13 present the facts, and then even as the government pointed out in
14 their response, these damage assessments are drafted by subject
15 matter experts. You have expert -- an internal expert saying that
16 this is the situation.

17 The defense believes that the third factor is there an
18 innocent explanation for the inconsistency. We don't believe there
19 would be.

20 As always, as the Court pointed out in its ruling under
21 Belamy, if the government doesn't like the conclusion that a damage
22 assessment drew or the conclusion that the defense is proffering,

1 they are welcome to rebut it with their own evidence, and we are
2 confident that they will attempt to do so.

3 Subject to your questions, ma'am, I'll move on to our next
4 three.

5 MJ: That's fine.

6 ADC[CPT TOOMAN]: Which would be 803(6). It's the defense's
7 position that these damage assessment are kept in the ordinary course
8 of business. This is a report that is -- if there is an unauthorized
9 disclosure, this is what agencies do, they assess the damage. The
10 government suggests that unauthorized disclosures are not part of
11 regularly conducted activity, the defense would suggest that
12 unauthorized disclosures happen all the time, in a number of
13 capacities, a number of ways and agencies react to them and this is
14 the way they react. They create a damage assessment and they
15 memorialize it and they discuss what happened. They discuss the way
16 forward. That is a business record.

17 MJ: Let me ask you a question. The government's response
18 states that the defense is relying on Army Regulation 380-5, which
19 requires information holders to notify OCA's of information
20 compromise. Because this only applies to the Army, it doesn't govern
21 whether records prepared by other agencies or the Department of
22 Defense qualify as public records.

1 ADC[CPT TOOMAN]: Right. Your Honor, the defense would have
2 to concede that the Army regulation doesn't control at least two of
3 the other agencies that created damage assessments in this case. I'm
4 not sure if it's of a classified nature if I can say the agency, so
5 at least two of the agencies would not be under the control of an
6 Army regulation, one of them would be. Clearly, the agency under the
7 control of the Army regulation would create the damage assessment.
8 The defense's position is even if there isn't a regulation that
9 states it, the fact that they created the assessment and they went
10 through it, that's the regular course of business. You have a
11 situation pop up; you react to it as an organization, that's what you
12 do.

13 MJ: Is the defense aware of anything similar to AR 380-5 or
14 whether AR 380-5 emanated from a larger piece of legislation or
15 executive order or policy that applies to the Department of Defense
16 or other government agencies?

17 ADC[CPT TOOMAN]: May I have a moment, Your Honor?

18 MJ: Yes.

19 [Pause.]

20 ADC[CPT TOOMAN]: Ma'am, Executive Order 13526 as well as DoD
21 Reg. the 5200 series.

22 MJ: The EO, what?

23 ADC[CPT TOOMAN]: I'm sorry, ma'am. 135 ----

1 MJ: Okay.
2 ADC[CPT TOOMAN]: ---- 26.
3 MJ: All right.
4 ADC[CPT TOOMAN]: As well as the 5200 series of Department of
5 Defense.

6 MJ: All right. Thank you.

7 ADC[CPT TOOMAN]: Finally, Your Honor, the last theory of
8 admissibility would be under 803(8), which is a record kept in the
9 course of -- a record or report that's maintained or created by a
10 government office setting forth the activities of the office. Again,
11 we think the damage assessments fall squarely into here. Damage
12 assessments clearly are record or report. These government agencies
13 are obviously public offices and they set forth the activities of
14 those agencies. One of the things the agencies have to do is create
15 these reports, and so the fact that they're doing is setting forth
16 their activities.

17 MJ: All right. So you're relying on 803(8)(a) only?

18 ADC[CPT TOOMAN]: As well as b based on, I guess, the same
19 regulations that would impose the duty under 803(6) that would make
20 it a business record. I guess alternatively the defense would say
21 that it's a -- that's imposed by law; it's a duty imposed by law, so
22 803(8)(bravo) as well, ma'am.

23 MJ: All right. Thank you.

1 Captain Morrow, before you begin, does the government
2 object -- again, there are two different ways that I can take
3 judicial notice. I can take judicial notice that these damage
4 assessments exist and come from these agencies, or I can take
5 judicial notice of whatever is in the substance of the damage
6 assessments. Does the government object to my taking judicial notice
7 of the existence of the damage assessments?

8 ATC[CPT MORROW]: No, Your Honor.

9 MJ: So that would mean the defense has not prior -- no
10 additional authentication requirements with respect to those damage
11 assessments?

12 ATC[CPT MORROW]: That's correct, Your Honor. We wouldn't
13 object to -- the government wouldn't object to you taking judicial
14 notice of the existence or that they were created by a respected
15 agency.

16 MJ: Okay.

17 ATC[CPT MORROW]: Your Honor, the government's plan was just
18 to really address the theories of admissibility by the defense.
19 Again, we would say -- the government would maintain that these
20 damage assessments are inadmissible under both M.R.E. 801 and M.R.E.
21 803(6) and 803(8). To begin with M.R.E. 801(d)2, although this
22 wasn't highlighted in the government's brief, the Court must start by
23 acknowledging that there is no indication that the damage assessments

1 in this case were adopted by the respected agency or organization.
2 They can hardly be characterized as speaking for the entire agency or
3 organization.

4 MJ: Don't they have to go through a review process before they
5 become final?

6 ATC[CPT MORROW]: That's correct, Your Honor, but if you
7 actually look at the assessments themselves they're not signed by the
8 head of the agency or the organization. These are not like the
9 statements of the President in the Rose Garden that you ruled as
10 admissible under 801(d)2 at the last -- or at a previous session over
11 the Secretary of Defense, or even a press secretary who puts out a
12 formal DoD opinion or press release asserting facts. Those types of
13 statements were meant to convey factual information to the public;
14 damage assessments are not that.

15 In fact, in the case of the IRTF, that was a separate body
16 all together and it was signed by an individual without the authority
17 to speak for the Defense Intelligence Agency or DoD.

18 In the case of the Department of State, and this is really
19 -- frankly very significant for this case, it was a draft document
20 itself. It hasn't been signed; it hasn't been worked on since August
21 2011. That fact really should address any -- any issue with whether
22 this should be admitted as a statement under 801(d)2.

1 As the defense noted, you laid out a three part test in
2 your judicial notice ruling, or actually it's really kind of
3 misleading to call it judicial notice, when it was more a ruling
4 about the admissibility of public statements -- theories of
5 admissibility. But the government would maintain that these damage
6 assessments do not convey unambiguous factual information. There may
7 be some unambiguous factual information in there; for example, these
8 documents were released on this date; these documents were released
9 on this date; this person was removed by "x" agency on this date,
10 something to that effect. They are mostly the compilation of expert
11 opinions assessing the state of affairs. The government would
12 maintain that they are speculative in nature, similar to the
13 speculations of counsel in an opening statement.

14 On that note the government referred to your judicial
15 notice ruling, in fact, the *McKean* case, which analyzed whether the
16 use of prior opening statements were admissible against the
17 government in subsequent criminal trials, speculations of counsel,
18 advocacy as to the credibility of witnesses, arguments as to
19 weaknesses in the prosecution's case or invitations to a jury to draw
20 certain inferences should not be admitted.

21 We discussed *ad nauseam* that -- the government's maintained
22 that damage assessments are speculative from the beginning.

23 MJ: All right. What about the 803(6) and (8)?

1 ATC[CPT MORROW]: Yes, Your Honor. You sort of made our
2 argument for us on 803(6). AR 380-5 is the regulatory authority
3 internal to the Army. It has no authority over the Department of
4 Defense, Department of State or NCIS. That cannot be the linchpin
5 for establishing that damage assessments are routine business
6 activity for these various organizations.

7 MJ: What about -- what's the government's position with respect
8 to the defense proposition ----

9 ATC[CPT MORROW]: That the executive order speaks to that?

10 MJ: ---- that the executive order and the DoD 520 serious would
11 apply to the Department of Defense?

12 ATC[CPT MORROW]: The executive order certainly would speak to
13 the Department of Defense as well as any DoD instruction or
14 directive; however, the government has not had an opportunity to
15 actually review that executive order to see whether it speaks to the
16 creation of a damage assessment as part of the regular course of
17 business. The government would maintain that damage assessments are
18 by nature reactive and ad hoc in that a compromise of classified
19 information is not a regular business activity, nor is a damage
20 assessment a regular business activity conducted in response to a
21 compromise. Of course, the government will review or can review at
22 the next break 13526 and can get back to the Court.

1 MJ: All right. Thank you. I appreciate that. The next item if
2 you would.

3 ATC[CPT MORROW]: 803(8). Just shortly, briefly on 803(8),
4 Your Honor. 803(8)(a), of course, speaks to records of the
5 activities of departments or public offices. Damage assessments do
6 not set forth the activities of the Department of State, NCIS or the
7 IRTF. In fact, as this Court recalls from its last argument and its
8 ruling on this matter, the only statement that will be admissible
9 under M.R.E. 803(8) was the 16 August 2010, letter from Secretary
10 Gates setting forth the activities of DoD in response to WikiLeaks in
11 a sense, which became known as the information review taskforce.
12 That was a clear statement or record of the public activities of the
13 Department of Defense.

14 In this case the damage assessments are less like that
15 letter and they're more like the other statements ruled inadmissible
16 under M.R.E. 803(8).

17 MJ: Well, let me ask a question here, because now I'm getting a
18 little confused. The government doesn't object to me taking judicial
19 notice of the existence of the damage assessments, but now you're
20 arguing to me that they're not admissible under any of these rules,
21 so why would I take judicial notice of something that's not
22 admissible?

1 ATC[CPT MORROW]: That's not -- we haven't asked -- I don't
2 know how to answer that, Your Honor. We haven't asked to take
3 judicial notice. The government hasn't asked ----

4 MJ: You just told me you didn't object.

5 ATC[CPT MORROW]: ---- the Court to take judicial notice of
6 these damage assessments.

7 MJ: I thought you just told me you didn't object to my taking
8 judicial notice that they exist and they're created by the particular
9 agency.

10 ATC[CPT MORROW]: That's correct, Your Honor.

11 MJ: I guess maybe I'm being confusing. There's two judicial
12 notice steps I can take. I can say, like I would with a regulation,
13 "Fact Finder, I'm taking judicial notice that this regulation
14 exists." There's something -- then I can say, "I take judicial notice
15 that everything in this regulation is an adjudicative fact."

16 ATC[CPT MORROW]: That's correct, or you could take judicial
17 notice of that regulation under M.R.E. 201(a), which -- for
18 regulation.

19 MJ: So is the government contesting the admissibility of what's
20 in the damage assessments under M.R.E. 803(8), 803(6)?

21 ATC[CPT MORROW]: Yes, Your Honor.

22 MJ: All right, because I see ----

23 ATC[CPT MORROW]: We are objecting that fact that it's ----

1 MJ: ---- a big distinction between my taking judicial notice of
2 something as an adjudicative fact and my taking judicial notice that
3 this exists. "Members, you don't need to further authenticate it.
4 Here it is; you can consider it."

5 ATC[CPT MORROW]: I agree, Your Honor. And the way the
6 government understands the defense argument is, you know, the Court
7 -- what they want is the Court to take judicial notice of the
8 existence of the damage assessment and essentially the contents of
9 the damage assessment, and then say, okay, once you've taken judicial
10 notice of the contents of this damage assessment, please admit the
11 contents as non hearsay or as an exception to hearsay.

12 MJ: Yes.

13 ATC[CPT MORROW]: So the government objects to that second
14 part.

15 MJ: So then you are objecting to my taking -- maybe I'm
16 confused. If I take judicial notice of something, that that exists,
17 the fact finder can have it and consider it.

18 ATC[CPT MORROW]: I guess the government's position would be
19 you could take judicial notice of the adjudicative fact that a damage
20 assessment exists.

21 MJ: What purpose would that serve?

22 ATC[CPT MORROW]: I don't know, Your Honor. It would be like
23 -- when we get to the government's motion, Your Honor, and maybe we

1 aren't being clear, but if we provide, for example, a news report
2 that says that -- the easiest example is if we provide the Department
3 of State list of foreign terrorist organizations, we would ask the
4 Court to take judicial notice of the fact that the Department of
5 State listed Al-Qaeda as a foreign terrorist organization. Then you
6 could rely on the source that we provided you in terms of determining
7 whether you're going to take notice of fact.

8 MJ: All right. Let's talk -- I'm going to ask the defense to
9 come back and address this too. In sentencing, if the rules are
10 relaxed versus non relaxed.

11 ATC[CPT MORROW]: The government would concede that they would
12 be admissible then.

13 MJ: All right. So it's the government's position that all
14 these damage assessments are hearsay?

15 ATC[CPT MORROW]: Yes, Your Honor.

16 MJ: And there's no exception that applies?

17 ATC[CPT MORROW]: No, Your Honor. Of course, any -- even with
18 the rules relaxed, it would be subject to any M.R.E. 505 litigation,
19 the substance of the damage assessments, but that's a separate
20 issues. The government can -- we would concede that the assessments
21 are authentic essentially.

22 MJ: All right. Thank you. Captain Tooman?

1 ADC[CPT TOOMAN]: Yes, Your Honor. Just a few things, Your
2 Honor. The government concedes that the damage assessment exists and
3 the government concedes that a government agency created the damage
4 assessment. The defense doesn't understand how it could not be a
5 report of that agency and fall under the exception 803(8). If the
6 government's acknowledging that it exists and that it was made by a
7 government agency, it's a report and it sets forth the conduct of
8 their activity and it would be admissible under that hearsay
9 exception.

10 The defense would also like to touch on this idea of
11 finality that the government talked about. These damage assessments
12 aren't signed, they're not final, they haven't been worked on since
13 August 2011. The defense's position is that fact alone speaks to the
14 finality of the assessment. To draw an analogy, Your Honor, if you
15 build a house and your pour the foundation and you run all the wiring
16 and all the plumbing and hang all the drywall, you put a roof on it
17 and put a door on it and windows, you start living in it, but you
18 never hang the crown molding, the house is still done. That's where
19 we're at with any damage assessment that doesn't have a signature.

20 Your Honor, has access to the damage assessments. We'd ask
21 you to look at them. They're final. This is what they are.

22 MJ: Don't things that are final have to go through an approval
23 process?

1 ADC[CPT TOOMAN]: The defense's position would be that it has
2 gone through an approval process. If it hasn't gone up for a
3 signature that's -- then the signature must not be part of the
4 approval process.

5 MJ: So an agency can't start something and say, "You know, I
6 really don't need to do this anymore. I'm just going to throw it in
7 a drawer somewhere," and that's the final product?

8 ADC[CPT TOOMAN]: We think that as some point, 15 months
9 later, that becomes -- that's what you produced. According to your
10 obligation to produce it, harkening back to the business records
11 exception, you have this obligation to produce it. If you don't
12 follow through, at some point that becomes your final product.
13 That's what you did.

14 Just finally, Your Honor, to touch on the government's
15 point about regularly -- again, talking about the business records
16 exception. When they talked about this isn't in the course of
17 regularly conducted business, it's important we think for the Court
18 to draw a distinction between, I guess, what regular means. Regular
19 doesn't mean that you go in every day and it's something that you do.
20 Regular means that if this scenario comes up, this is what you do.
21 This is how you react to it; this is your response. So that's --
22 subject to your questions, Your Honor, that is the defense's
23 position.

1 MJ: Is either side familiar with the Foerster case,
2 F-O-E-R-S-T-E-R. It's the case involving -- it's a case about
3 testimonial -- it's about testimonial hearsay, but involved a bank
4 affidavit by someone who had claimed fraud. I don't have the case on
5 the top of my head here, but ----

6 ADC[CPT TOOMAN]: I'm not familiar, Your Honor.

7 ATC[CPT MORROW]: Neither are we, Your Honor.

8 MJ: All right. Thank you.

9 ADC[CPT TOOMAN]: Thank you, Your Honor.

10 MJ: Anything further on the defense judicial notice motions?

11 ADC[CPT TOOMAN]: No, Your Honor.

12 ATC[CPT MORROW]: No, Your Honor.

13 MJ: All right. Do you want to proceed on with the government's
14 judicial notice or do you want to take lunch and then start that
15 afterwards? I mean, we started late today, so it's ----

16 ATC[CPT MORROW]: Yes, Your Honor.

17 MJ: I don't care either way.

18 ATC[CPT MORROW]: The government would just prefer to go print
19 and push through, but I think the defense wants to take a lunch
20 break.

21 CDC[MR. COOMBS]: We'll go ahead and push through.

22 MJ: All right. How long of a recess do you need?

23 ATC[CPT MORROW]: About 5 minutes, Your Honor.

1 MJ: All right. Why don't we do it for 10? Court is in recess
2 until 1225.

3 [The Article 39(a) session recessed at 1215, 9 January 2013.]

4 [The Article 39(a) session was called to order at 1229, 9 January
5 2013.]

6 MJ: This Article 39(a) session is called to order. Let the
7 record reflect all parties present when the Court last recessed are
8 again present in court.

9 ATC[CPT MORROW]: Your Honor, the government requests you take
10 judicial notice of the following Army Field Manuals, Executive
11 Orders, and various news articles. We'll clarify exactly what we
12 would like the Court to take judicial notice of for those news
13 articles.

14 MJ: Let's start with the regulations first.

15 ATC[CPT MORROW]: Yes, Your Honor.

16 MJ: Is the basis for judicial notice the same for all of them?

17 ATC[CPT MORROW]: Yes, Your Honor. We would contend that
18 these field manuals are relevant because PFC Manning is alleged to
19 have compromised various forms of intelligence. He was, in addition,
20 an intelligence analyst for a brigade combat team. These regulations
21 -- we request the Court take judicial notice of these regulations
22 because they are relevant on sentencing to capture any ----

23 MJ: So you want them just for sentencing?

1 ATC[CPT MORROW]: No, on the merits as well with respect to
2 the accused's knowledge.

3 MJ: Does the government have any evidence that these accused
4 did know of these regulations?

5 ATC[CPT MORROW]: Your Honor, we would proffer that as we go
6 through these field manuals with relevant witnesses and discuss
7 training, et cetera that's conducted and the regulations that are
8 applicable to people in the accused's position.

9 MJ: All right. Let's go over them one-by-one. Army Field
10 Manual 2-0 Intelligence.

11 ATC[CPT MORROW]: Yes, Your Honor. That field manual outlines
12 the role of intelligence and the processes associated with planning,
13 collecting, disseminating and evaluating intelligence. It also
14 describes staff support, Army intelligence capabilities and
15 intelligence support to land operations. Are you asking for sort of
16 a statement of relevancy for each one, Your Honor?

17 MJ: Yes.

18 ATC[CPT MORROW]: The government maintains that Army Field
19 Manual 2-0 is relevant because it outlines the role intelligence and
20 it sort of establishes the baseline for the role of an intelligence
21 analyst and the role of intelligence daily operations in the Army,
22 specifically to the deployed forces.

1 Your Honor, I'll just note that the programs of instruction
2 for AIT have been -- for Advanced Individual Training for a 35 Fox
3 have been pre admitted by this Court previously, and that's where
4 these Army Field Manuals are taught.

5 MJ: And a witness is going to come and testify to that?

6 ATC[CPT MORROW]: Yes, Your Honor.

7 MJ: Okay. Is that true of all the field manuals?

8 ATC[CPT MORROW]: That's true of all the field manuals, Your
9 Honor, and ----

10 MJ: So that would be ----

11 ATC[CPT MORROW]: ---- it's true of the MOS 35 Fox Soldier's
12 Manual and Trainers Guide.

13 MJ: So 1, 2, 3, 4 and 5?

14 ATC[CPT MORROW]: Yes, Your Honor.

15 MJ: All are taught in AIT?

16 ATC[CPT MORROW]: Taught or reference in AIT, Your Honor.

17 MJ: All right.

18 ATC[CPT MORROW]: Six through nine, Your Honor, are simply --
19 Executive Order 12958 is simply the predecessor order to Executive
20 Order 13526, which governs classified national security information.

21 Are you there? I'm sorry, Your Honor. Excuse me.

22 MJ: Hold on. That's okay. So these are all field manuals,
23 right, everything before six, is that correct?

1 ATC[CPT MORROW]: That's correct, Your Honor.

2 MJ: Okay. Let me make my job easy here. Hold on.

3 ATC[CPT MORROW]: I'm not actually -- number 5, I don't know
4 whether it's a -- I don't believe it's a field manual, but it's an
5 Army publication.

6 MJ: Okay. All right. Let's talk about -- what is it six
7 through nine?

8 ATC[CPT MORROW]: That's correct, Your Honor.

9 MJ: Okay.

10 ATC[CPT MORROW]: Six through nine, Executive Order 12958 is
11 simply the predecessor order to Executive Order 13526, which governs
12 classified national security information.

13 MJ: Why would that be relevant?

14 ATC[CPT MORROW]: It's relevant because some of the
15 information originally classified in this case was classified under
16 the previous Executive Order.

17 Seven, eight and nine are just amendments to that Executive
18 Order.

19 MJ: Okay.

20 ATC[CPT MORROW]: Number 10, Your Honor, the government
21 provided a February 2010 British Broadcasting Company news report, or
22 the link to a news report, Your Honor. The government simply

1 requests that the Court take judicial notice to the fact that Julian
2 Assange was in Iceland in February 2010.

3 MJ: Based on a newspaper article?

4 ATC[CPT MORROW]: Yes, the report itself. Yes, Your Honor.

5 That fact is relevant because it provides context for some of the
6 computer forensic evidence including chat logs between PFC Manning
7 and Julian Assange.

8 MJ: Does the government have any case law that a newspaper
9 article -- that things stated in a newspaper article can be
10 adjudicative facts? If I didn't take judicial notice of it, it would
11 be hearsay, right?

12 ATC[CPT MORROW]: The newspaper article itself is hearsay,
13 Your Honor. The government is simply requesting that you use the
14 events reported in the newspaper article to conclude that Julian
15 Assange -- or to take judicial notice -- to form your decision on
16 whether to take judicial notice of the fact that Julian Assange was
17 in Iceland in February 2010.

18 MJ: So the fact that this is in this newspaper article meets --
19 is it the government's position that that's a fact that's not subject
20 to reasonable dispute?

21 ATC[CPT MORROW]: The fact that he was in Iceland in February
22 2010, because it was reported in various news outlets, including this
23 report, is a fact that is not subject to reasonable dispute.

1 MJ: And you're hanging your hat on one article?

2 ATC[CPT MORROW]: We are at this time, Your Honor, but the
3 government can simply provide additional evidence.

4 MJ: All right. And you're saying it's relevant why?

5 ATC[CPT MORROW]: It's relevant because -- during trial, Your
6 Honor, the government will offer into evidence chat logs between the
7 accused and Julian Assange, that date when he was -- Assange was in
8 Iceland is relevant -- provides context to some of the discussions
9 between them. And why -- certainly, the government would maintain
10 why certain information was released relating to Iceland.

11 MJ: All right.

12 ATC[CPT MORROW]: Number 11, Your Honor, is a *New York Times*
13 Article entitled *Pentagon Sees Threat from Online Muckrakers*, dated
14 18 March 2010. The government simply requests that the Court take
15 judicial notice of the fact that Lieutenant Colonel Packnett was
16 quoted in this article that was published on 18 March 2010.

17 MJ: Who's Lieutenant Colonel Packnett?

18 ATC[CPT MORROW]: Lieutenant Colonel Packnett, Your Honor, was an
19 Army spokesperson for an Army Intelligence Organization. The fact is
20 relevant specifically that he was quoted in this article for sort of
21 a similar reason to the Assange fact, which is it provides context
22 for some of the computer forensic evidence, specifically a serious a

1 chats between PFC Manning and Assange where they discussed this
2 article.

3 MJ: How is this not hearsay?

4 ATC[CPT MORROW]: We're simply asking -- again, we're not
5 asking you to take notice of the contents of the article or that
6 anything in there is an adjudicative fact, simply the fact that the
7 article quoted Colonel Packnett and that it was dated 18 March 2010.

8 MJ: So that's what you want me to take judicial notice of?

9 ATC[CPT MORROW]: Yes, Your Honor. In fact, we have a -- we
10 have filing -- I have a filing prepared last night that could
11 probably -- for some of these news articles could clarify what
12 exactly we're seeking to take judicial notice of.

13 MJ: That would be very helpful.

14 ATC[CPT MORROW]: Yes, Your Honor. Would you like me to keep
15 going, Your Honor?

16 MJ: All right. So you want it -- let me just make sure I'm
17 understanding this a little better. I know you're going to give me
18 something with a little more clarity, but you want -- the only thing
19 you want me to take judicial notice of is on 18 March 2010, the *New*
20 *York Times* -- there's a *New York Times* article that quoted a
21 Lieutenant Colonel Lee Packnett, an Army Spokesman, confirmed that
22 the report -- what report? The report was real?

1 ATC[CPT MORROW]: No, Your Honor. Simply the fact that
2 Lieutenant Colonel Packnett was quoted in this article and that the
3 article was dated 18 March 2010.

4 MJ: Quoted in -- do you want the name of the article or do you
5 just want a *New York Times* article dated 18 March 2010?

6 ATC[CPT MORROW]: A *New York Times* article is sufficient, Your
7 Honor. We don't need the name of ----

8 MJ: Okay.

9 ATC[CPT MORROW]: Yes, the name of the article as well.

10 MJ: Why is the name *Pentagon Sees a Threat from Online*
11 *Muckrakers* relevant?

12 ATC[CPT MORROW]: Only in the sense that it -- only in the
13 sense that it provides context for the article, but -- or for the
14 fact, but again, it's not necessarily relevant to -- it's not
15 necessary for what the government intends to use it for.

16 MJ: Shouldn't there be a 403 concern then having a newspaper
17 article saying that the Pentagon sees a threat from online
18 Muckrakers.

19 ATC[CPT MORROW]: I don't see a 403 issue there, Your Honor,
20 but certainly ----

21 MJ: Okay. But you don't need the name of the article?

22 ATC[CPT MORROW]: No, Your Honor.

1 MJ: Tell me again how the fact that this person is quoted in an
2 article dated 18 March 2010, is relevant?

3 ATC[CPT MORROW]: Yes, Your Honor. It establishes a timeline
4 essentially of -- it also confirms the authenticity of the chat logs,
5 if you want to look at it that way. The government is going to
6 introduce evidence that PFC Manning was discussing this article with
7 Julian Assange and they were laughing about it, et cetera. The
8 government -- simply -- this is simply to provide context for that
9 chat and to establish the authenticity of the chat.

10 MJ: Okay.

11 ATC[CPT MORROW]: Your Honor, the next adjudicative fact the
12 government would like for you to take judicial notice of is a *New*
13 *Yorker* profile of Julian Assange entitled *No Secrets Julian Assange*
14 *Mission for Total Transparency* was dated 7 June 2010.

15 MJ: All right. I've got ----

16 ATC[CPT MORROW]: It's marked as Appellate Exhibit ----

17 MJ: It's the addendum. Okay.

18 ATC[CPT MORROW]: ---- 465.

19 MJ: So this has already been filed?

20 ATC[CPT MORROW]: We just had it marked as an Appellate
21 Exhibit, Your Honor.

22 MJ: Defense have a copy?

23 ADC[CPT TOOMAN]: Yes, Your Honor.

1 MJ: Okay. So these are the adjudicative facts that you want me
2 to take judicial notice of that's in these articles?

3 ATC[CPT MORROW]: That's correct, Your Honor.

4 MJ: You don't want me to take judicial notice of the articles.

5 ATC[CPT MORROW]: And the article would be evidence for the
6 adjudicative evidence.

7 MJ: Okay.

8 ATC[CPT MORROW]: The relevance of the *New Yorker* profile,
9 Your Honor?

10 MJ: Yes?

11 ATC[CPT MORROW]: The relevance is that, again, this relates
12 to chat logs between PFC Manning and in this case Agent Lamo, in
13 which they discuss the publication of this article prior to the
14 article's release essentially confirming the fact -- the government
15 would maintain would confirm the fact that Manning was having contact
16 with Assange. The date of the chat logs was several weeks prior to
17 the date of the publication of this article.

18 MJ: All right.

19 ATC[CPT MORROW]: The next fact, Your Honor, the government
20 requests that you take judicial notice of the fact that WikiLeaks and
21 various news organizations began publishing Department of State
22 diplomatic cables over the weekend of 27, 28 November 2010.

23 MJ: And that's based on?

1 ATC[CPT MORROW]: That's based on the letter, so Enclosure 13,
2 I believe, which is a letter from Harold Koh -- signed by Harold Koh,
3 who is the legal advisor to the Department of State. As well as
4 Enclosure 14 also provides evidence of that fact, Your Honor.

5 The relevance of this, Your Honor, as it relates ----

6 MJ: Where does this letter come from? How do know it's even
7 authentic?

8 ATC[CPT MORROW]: It was published by the Washington Post,
9 Your Honor.

10 MJ: So that makes it authentic?

11 ATC[CPT MORROW]: It -- well, we would argue that -- the
12 government would argue that posted by the Washington Post and there
13 was no indication that it was inauthentic, but again, we provided the
14 other -- the separate news report that discusses the release of these
15 cables over this time period.

16 MJ: Why wouldn't the newspaper report be hearsay?

17 ATC[CPT MORROW]: Again, we're not asking you take -- we're
18 not asking you to -- well, we're asking you to take judicial notice
19 of the adjudicative fact, but you can rely on the -- you're not bound
20 by the Rules of Evidence in terms of what you can rely on in
21 determining whether to take judicial notice of a fact. The news
22 report is hearsay. We're asking the Court to use that as a reliable

1 source to inform its decision on whether to take judicial notice of
2 the fact itself.

3 MJ: How does the letter -- how is the letter relevant to -- how
4 is it the letter a source where I can go to find judicial notice that
5 Department of State cables began public -- or the publication began
6 on the weekend of 27 to 28 November 2010? This letter is dated 27
7 November 2010, but ----

8 ATC[CPT MORROW]: That's correct, Your Honor.

9 MJ: ---- it doesn't say anything about when -- anything about
10 publication by anybody.

11 ATC[CPT MORROW]: Yes, certainly this isn't -- this isn't the
12 best source for the reliability of that fact, but the government
13 would ask you to consider this letter as well as the news article in
14 determining whether to take judicial notice of the facts.

15 MJ: All right. What's next?

16 ATC[CPT MORROW]: The government requests that you take
17 judicial notice of the fact that Al-Qaeda and its affiliates, Al-
18 Qaeda and the Islamic Maghreb, Al-Qaeda in Iraq, and Al-Qaeda in the
19 Arabian Peninsula are all listed as foreign terrorist organizations
20 by the Department of State, and are in fact enemies of the United
21 States.

22 MJ: And where did this U.S. Department of State 28 September
23 2012, Foreign Terrorist Organization chart come from?

1 ATC[CPT MORROW]: It is from the Department of State website,
2 which lists foreign terrorist organizations and the date they were
3 designated. Additionally, Your Honor ----

4 MJ: Where does it say Al-Qaeda and its affiliates?

5 ATC[CPT MORROW]: Well, it says -- it lists each of them
6 separately, Your Honor. If you ----

7 MJ: Where does it say anything about Al-Qaeda and who is
8 affiliated with Al-Qaeda?

9 ATC[CPT MORROW]: That's a fair point, Your Honor. I mean,
10 you can use them separately. It specifically lists Al-Qaeda in Iraq,
11 Al-Qaeda in the Islamic Maghreb, Al-Qaeda, and Al-Qaeda in the
12 Arabian Peninsula.

13 MJ: Where do you see Al-Qaeda AQ?

14 ATC[CPT MORROW]: If you look on Page 2 of the enclosure, Your
15 Honor.

16 MJ: Okay.

17 ATC[CPT MORROW]: The third one down.

18 MJ: Where is Al-Qaeda in the Arabian Peninsula? Oh, I see it.
19 Okay. This one has a date of 1/19/2010. Does that precede all of
20 the alleged charged offenses here?

21 ATC[CPT MORROW]: It doesn't, Your Honor. The government's
22 understanding is that the date of designation is more important, so
23 although this list is dated on that date ----

1 MJ: No, the date of -- that's the date of designation for AQAP
2 is 1/19/2010.

3 ATC[CPT MORROW]: That's correct, Your Honor. Some of the --
4 well, with respect to Article 104 -- the Article 104 spec that
5 information was transmitted subsequent to the designation.

6 MJ: All right. This is relevant to the 104 spec?

7 ATC[CPT MORROW]: Yes, Your Honor. It sort of goes hand-in-
8 hand with the next fact, which is that the government requests you
9 take judicial notice of the fact that Osama bin Laden is a member of
10 Al-Qaeda and an enemy of the United States. The relevance, of
11 course, is Article 104, but specifically the government's notice of
12 declassification filed on 29 November 2012.

13 MJ: What are you relying on for that one?

14 ATC[CPT MORROW]: That would be the ----

15 MJ: No. I mean enclosure what? You have your supplemental --
16 your government addendum, but I don't ----

17 ATC[CPT MORROW]: That's correct, Your Honor.

18 MJ: But I can't link up what addendum and what enclosure it
19 references.

20 ATC[CPT MORROW]: Yes, Your Honor. I can actually ----

21 MJ: Let's go through one by one. A is enclosure what?

22 ATC[CPT MORROW]: A would be enclosure 10, Your Honor.

23 MJ: B?

1 ATC[CPT MORROW]: B would be enclosure 11.

2 MJ: C?

3 ATC[CPT MORROW]: C would be enclosure 12.

4 MJ: D is 13 and 14?

5 ATC[CPT MORROW]: That's correct, Your Honor. E would be 15
6 as enclosure 18, simply additional evidence that the Department of
7 State designated AQAP as a foreign terrorist organization.

8 MJ: All right.

9 ATC[CPT MORROW]: If, Your Honor, is -- the government would
10 ask you to -- the Court to rely on its -- a fact that's known in the
11 community, specifically the world.

12 MJ: All right. Without giving me anything to rely on?

13 ATC[CPT MORROW]: We can provide you more to rely on, Your
14 Honor. We can -- I think -- the government believes it can provide
15 at least the FBI most wanted list prior UBL's death. The relevance
16 there, Your Honor, is as the Court is aware, the government intends
17 to present evidence of digital media found during the UBL raid,
18 specifically, a letter from UBL to a member of Al-Qaeda requesting
19 that that member gather Department of Defense information; a letter
20 back to UBL attached to which were all the CIDNE Afghanistan
21 Significant Activity reports, finally, Department of State
22 information. All that information was in the possession of UBL at
23 the time of the raid. That information has been declassified.

1 MJ: All right.

2 ATC[CPT MORROW]: G, Your Honor, the government requests you
3 take judicial notice that Adam Gadahn is a member of Al-Qaeda and an
4 enemy of the United States.

5 MJ: Why is that relevant?

6 ATC[CPT MORROW]: This is relevant to evidence the government
7 will present on sentencing, specifically a video of Adam Gadahn
8 discussing WikiLeaks and Al-Qaeda's response there. The government
9 believes that video would be relevant on the merits as well.

10 MJ: Why?

11 ATC[CPT MORROW]: Specifically, the possession of information
12 by the enemy.

13 MJ: All right. This is from the FBI website?

14 ATC[CPT MORROW]: That's correct, Your Honor.

15 Finally, Your Honor, the government requests you take
16 judicial notice of the fact that *Inspire* is a magazine that advocates
17 violent jihad and promotes the idea -- ideology of Al-Qaeda in the
18 Arabian Peninsula.

19 MJ: Wait a minute. Enclosures 17 and 18, what are they
20 supporting?

21 ATC[CPT MORROW]: Seventeen, Your Honor, the government
22 withdraws that enclosure from consideration. It's simply -- but you

1 could rely on that enclosure to make a determination that Al-Qaeda is
2 an enemy.

3 MJ: Do you want me to consider it or not?

4 ATC[CPT MORROW]: Please consider it.

5 MJ: So for that one, for Al-Qaeda and its affiliates, it's
6 enclosures 15, 17 and 18?

7 ATC[CPT MORROW]: That's correct, Your Honor.

8 MJ: Okay. Gadhafi is enclosure 16?

9 ATC[CPT MORROW]: Yes, Your Honor.

10 MJ: What did we -- what is enclosure 19 in there?

11 ATC[CPT MORROW]: Nineteen, Your Honor, the government
12 withdraws that enclosure for consideration.

13 MJ: All right. Enclosure 20?

14 ATC[CPT MORROW]: Enclosure 20, Your Honor, is simply -- it's
15 a copy of *Inspire* magazine. We'd ask the Court to consider that copy
16 in determining whether or not to take judicial notice of subparagraph
17 h of the addendum, which is that *Inspire* is a magazine that advocates
18 violent jihad and promotes the ideology of Al-Qaeda in the Arabian
19 Peninsula.

20 MJ: Is the conclusion that it advocates violent jihad and
21 promotes the ideology of AQAP an appropriate subject for judicial
22 notice?

23 ATC[CPT MORROW]: I believe it's an adjudicative fact.

1 MJ: If I read this magazine, that's what I'm going to come to
2 the conclusion of?

3 ATC[CPT MORROW]: Yes, Your Honor.

4 MJ: How do I know how often it's printed?

5 ATC[CPT MORROW]: That's something the government can
6 certainly provide additional evidence of. I believe it's printed
7 monthly, but it could be quarterly. We will have -- the government
8 will have additional witnesses that will likely discuss *Inspire*
9 magazine.

10 MJ: Witnesses who are familiar with the magazine?

11 ATC[CPT MORROW]: Yes, Your Honor. Witnesses in government.

12 MJ: Okay.

13 ATC[CPT MORROW]: Subject to any questions, Your Honor.

14 MJ: What's the relevance of *Inspire* magazine?

15 ATC[CPT MORROW]: Your Honor, it's relevant on sentencing,
16 specifically the government will present evidence it mentions
17 WikiLeaks and what individuals should do with WikiLeaks and how they
18 should react to what's published.

19 MJ: Now, in a couple of these you mentioned that it references
20 WikiLeaks. Is it referencing anything disclosed by the accused to
21 WikiLeaks or allegedly disclosed by the accused?

22 ATC[CPT MORROW]: It's the -- the magazine -- specifically the
23 copy we provided the Court is dated, I believe -- it's the winter

1 2010, version of the magazine. The government maintains that the
2 reference to WikiLeaks postdates the accused's misconduct and is in
3 response to information posted on WikiLeaks or leaked to WikiLeaks by
4 the accused.

5 MJ: Is the reference to WikiLeaks in this copy that you gave
6 me?

7 ATC[CPT MORROW]: It is, Your Honor.

8 MJ: Where?

9 ATC[CPT MORROW]: One moment. It's the bottom of page 44 and
10 the top of page 45.

11 MJ: Okay. I'm getting confused. Is it the Bates number pages
12 or the page number pages?

13 ATC[CPT MORROW]: The page number pages, Your Honor, of the
14 actual magazine.

15 MJ: My page numbers stop at 35. 45 and what?

16 ATC[CPT MORROW]: The bottom of page 44 and the top of page
17 45.

18 MJ: Okay.

19 ATC[CPT MORROW]: The government will make an additional copy,
20 Your Honor, if that enclosure is incomplete.

21 MJ: No. This is fine. Okay.

22 ATC[CPT MORROW]: Any other questions, Your Honor?

23 MJ: No.

1 ATC[CPT MORROW]: Thank you.

2 MJ: All right. Defense, let's go by category again.

3 ADC[CPT TOOMAN]: Yes, ma'am.

4 MJ: Field manuals.

5 ADC[CPT TOOMAN]: Ma'am, our objection is to relevance. We
6 think based on the government's arguments today any decision you make
7 is best deferred until we hear the testimony to see if the testimony
8 makes it relevant.

9 MJ: If the testimony makes it relevant, is there any other
10 objection to those judicial notice?

11 ADC[CPT TOOMAN]: No, ma'am. So that would be 1 through 9.

12 MJ: One through nine? Okay.

13 ADC[CPT TOOMAN]: Yes, ma'am.

14 MJ: Well, you heard the government proffer that some of the
15 classification of the charged offenses was done based on the prior
16 executive order. Does the defense agree with as a proffer?

17 ADC[CPT TOOMAN]: One moment, Your Honor. Yes, we agree with
18 that, Your Honor.

19 MJ: So what's the relevance objection to the prior executive
20 order and its amendments?

21 ADC[CPT TOOMAN]: Your Honor, the relevance objection is the
22 government hadn't articulated the relevance of it. Now there would
23 be no relevance objection.

1 MJ: All right. So really, does the defense object to me taking
2 judicial notice of 6, 7, 8 and 9?

3 ADC[CPT TOOMAN]: No, Your Honor.

4 MJ: Okay. And I've got your objections to one through 5
5 depending on the witnesses. Okay.

6 ADC[CPT TOOMAN]: Next, Your Honor, I will address, I guess,
7 10 through 14.

8 MJ: Okay.

9 ADC[CPT TOOMAN]: Should be the newspaper articles.

10 MJ: Well, remember they're not asking me to take judicial
11 notice of the newspaper article, I'm now understanding. This is what
12 they want me to base their judicial notice -- the things they want me
13 to take judicial notice of are on the addendum.

14 ADC[CPT TOOMAN]: Yes, Your Honor. The defense still believes
15 that your ruling from the last time we covered this issue is
16 appropriate to follow here. There's no hearsay exception for the
17 newspaper article. It's hearsay within hearsay. The first locked
18 door the government needs to get through is the hearsay of the
19 newspaper. Once they get through that, then they could get into
20 potentially anything that's inside that newspaper. But they don't
21 even get past the fact that this is a newspaper article and there's
22 not -- as this Court pointed out, no one can find a hearsay exception
23 to the newspaper article.

1 MJ: So is it defense's position that I can never rely on
2 newspaper articles? Say something is in 15 newspapers, that this
3 event occurred, that I can never use that as a basis for finding an
4 adjudicative fact?

5 ADC[CPT TOOMAN]: That would not be the position of the
6 defense, Your Honor, no.

7 MJ: Well, I think that's what the government is asking me to
8 do.

9 ADC[CPT TOOMAN]: Well, the defense's position is they haven't
10 provided 15 news articles for any of these facts. They provided one
11 and that's what they're relying on.

12 MJ: Okay.

13 ADC[CPT TOOMAN]: And the proffer today is different than what
14 was filed under the motion -- or the request today is different than
15 what they asked in the motion.

16 MJ: Would the defense like additional time based on the
17 addendum provided by the government today, because that does change
18 that. That at least changed my impression of what the government was
19 asking for.

20 ADC[CPT TOOMAN]: One moment, Your Honor. Your Honor, unless
21 the government is going to produce any additional evidence, then we
22 would not ask for additional time.

1 MJ: Is the government producing any additional evidence or
2 relying on what you've given me?

3 ATC[CPT MORROW]: I didn't -- I'm sorry. The government
4 didn't hear that, Your Honor.

5 MJ: I asked the defense if they needed additional time because
6 the addendum to the government -- it wasn't clear, at least to me,
7 what the government was asking. I thought you were asking for
8 judicial notice of the articles themselves. With the addendum now,
9 you're asking me to use the articles to -- as the sources for my
10 ability to take judicial notice of these adjudicative facts. I asked
11 the defense if they needed more time based on this addendum that was
12 filed on -- today, and they have told me that if you're relying on
13 what you've given me in the enclosures, no, but if you're going to
14 supplement the enclosures, yes.

15 I'm asking you if you're going to supplement the enclosures
16 or hang your hat on what you have here?

17 ATC[CPT MORROW]: Your Honor, we will supplement some of the
18 enclosures, yes, Your Honor. The government has no objections to the
19 defense taking additional -- needing additional time.

20 MJ: How long are you going to take to supplement these
21 enclosures? I'd like to handle this maybe at the next 16, 17
22 January?

23 ATC[CPT MORROW]: That will easily be done.

1 MJ: How much notice do you need of the supplemental enclosures?
2 ADC[CPT TOOMAN]: Just as soon as possible, Your Honor.
3 MJ: How long will it take you to have them?
4 ATC[CPT MORROW]: By close of business on Friday, Your Honor.
5 MJ: All right. Incorporate that into the Court calendar,
6 please.

7 Do you want to continue your argument with what we have
8 here? I mean, if you're argument is assume there would be -- well,
9 you can't assume anything.

10 ADC[CPT TOOMAN]: Your Honor, I think we can still address
11 some of them based on the addendum.

12 MJ: Okay.

13 ADC[CPT TOOMAN]: I think we're comfortable addressing a
14 couple of them.

15 MJ: Okay.

16 ADC[CPT TOOMAN]: I guess it would be enclosure 11 to the
17 original motion, if you're looking at the addendum, paragraph
18 1(bravo). The defense doesn't see any relevance to the fact that a
19 lieutenant colonel was quoted in the New York Times to the extent
20 that the government is asking for the title of that article to be
21 judicially noticed, then we think the hearsay exception does apply --
22 there is no hearsay exception to that, then they are asking you to
23 take notice of hearsay. There is no exception to that.

1 I guess in 1(Charlie) again when they're asking you to take
2 judicial notice of the entire article, it seems to the defense ----

3 MJ: Where are you looking here?

4 ADC[CPT TOOMAN]: 1(Charlie) on the addendum, Your Honor.

5 MJ: Now, my understanding from the government is they intend to
6 introduce evidence of some kind of a discussion that occurred prior
7 to this article about this article. If I'm understanding the
8 government correctly, they want to introduce the fact that this
9 article exists to corroborate the logs that this discussion occurred.
10 Is that what I'm understanding?

11 ATC[CPT MORROW]: That's correct, Your Honor.

12 ADC[CPT TOOMAN]: Your Honor, if I may ask the government ----
13 MJ: Yes. Certainly.

14 ADC[CPT TOOMAN]: ---- and the Court a question. Is the
15 supplemental filing going to offer any more insight into what exactly
16 you're asking for?

17 ATC[CPT MORROW]: If the government needs to provide relevance
18 of the -- establish the relevance of a particular fact, we can
19 certainly supplement, but the -- I suppose the relevance ----

20 MJ: This is all on oral argument. The Court would very greatly
21 benefit from -- what is it -- I now know what you want me to take
22 judicial notice of, what you're relying on for me to take that
23 judicial notice of these things. Why these articles, et cetera, why

1 these enclosures are sources that are not subject to reasonable
2 dispute and what the relevance is going to be on either the merits,
3 sentencing or both. Can the government do that by Friday?

4 ATC[CPT MORROW]: Yes, Your Honor.

5 MJ: Okay. Defense, do you still want to argue this piecemeal,
6 or do you want to wait and do it on the 16th?

7 ADC[CPT TOOMAN]: What is the date on Friday, Your Honor? I
8 guess the concern from the defense is then that's one business day --
9 of course, we have the weekend, but it's one business day ----

10 MJ: We're doing Wednesday, Thursday next week.

11 ADC[CPT TOOMAN]: Okay.

12 MJ: Does that give you enough time?

13 ADC[CPT TOOMAN]: That's fine, Your Honor.

14 MJ: That way we can at least -- I mean, I have pretty good idea
15 of what's going on. When I get the filings on Friday, I can look at
16 them, we can do that in addition to the speedy trial argument and
17 then come back on the 17th ----

18 ADC[CPT TOOMAN]: That's no issue, ma'am. I was thinking we
19 were starting on Tuesday.

20 MJ: All right. Does that work for both sides?

21 ATC[CPT MORROW]: Yes, Your Honor. So you would like a brief
22 that discusses relevance, why you should rely on a source?

1 MJ: Yes. Defense, do you want to file a supplemental filing
2 for me to consider before -- maybe on Tuesday based on theirs?

3 ADC[CPT TOOMAN]: If need be, Your Honor. I would anticipate
4 that we could probably just argue it without a response, but --
5 unless the Court would prefer something in writing from the defense.

6 MJ: Well, it gives me a chance to at least get an idea of what
7 your position is before I commence, so that would be helpful. It
8 doesn't have to be anything lengthy. It doesn't have to be narrowly
9 tailored to the issues that are going to be raised by the government.

10 ATC[CPT MORROW]: The government's brief will be brief, Your
11 Honor.

12 MJ: Okay.

13 ADC[CPT TOOMAN]: So the defense will plan to have you
14 something by Tuesday, Your Honor.

15 MJ: Thank you. Build that into the calendar, please.

16 ADC[CPT TOOMAN]: I guess we can address looking at the
17 original motion dated 16 November. Your Honor, we'll just save
18 everything, for the sake of cleanliness.

19 MJ: I think it will be all clear when we have the government's
20 supplemental filing and then we can just address it all at one time.
21 Thank you.

22 ADC[CPT TOOMAN]: Yes, Your Honor.

1 MJ: All right. So really the only thing remaining here that we
2 need supplemental filings on is what's been provided in the addendum
3 and Enclosures 11 through 21 minus 19.

4 ATC[CPT MORROW]: Yes, Your Honor.

5 MJ: Anything else we need to address with respect to judicial
6 notice?

7 ATC[CPT MORROW]: Ma'am, I was going to respond to something
8 else. Sorry. The Foerester case, do you have a cite for that?

9 MJ: Yes. 65 M.J. 120.

10 ATC[CPT MORROW]: Yes, ma'am.

11 MJ: Court of Appeals for the Armed Forces 2007.

12 ATC[CPT MORROW]: Sorry, Your Honor. We do have a copy of the
13 DoD Manual 501-05 that we can provide to you. We had referenced it
14 in the over-classification argument ----

15 MJ: All right.

16 ATC[CPT MORROW]: Or the damage assessment argument. We can
17 give that to you over lunch if you'd like.

18 MJ: Is it a big thick document?

19 ATC[CPT MORROW]: We can just print the relevant portion, Your
20 Honor.

21 MJ: Thank you.

22 Anything else we need to address with respect to judicial
23 notice?

1 ADC[CPT TOOMAN]: No, Your Honor.

2 MJ: Ready to take a lunch break?

3 CDC[MR. COOMBS]: Yes, Your Honor.

4 MJ: How long would you like?

5 CDC[MR. COOMBS]: If we could go until 1430.

6 MJ: Does that work for the government?

7 ATC[CPT MORROW]: Yes, ma'am.

8 MJ: All right. Court is in recess until 1430.

9 **[The Article 39(a) session recessed at 1317, 9 January 2013.]**

10 **[The Article 39(a) session was called to order at 1436, 9 January**

11 **2013.]**

12 MJ: This Article 39(a) session is called to order. Let the
13 record reflect all parties present when the Court last recessed are
14 again present in Court.

15 Are the parties ready to proceed with the motion to compel?

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 ATC[CPT MORROW]: Yes, Your Honor.

18 CDC[MR. COOMBS]: Your Honor, for this motion the following
19 Appellate Exhibits are applicable. I've asked the court reporter to
20 pull them for the Court: Appellate Exhibit 344, which is our initial
21 defense witness list for the merits and sentencing, filed on 15
22 October 2012; Appellate Exhibit 387, which is our witness list for
23 sentencing only case, which is kind of overcome by events, but it

1 does still have some factual information; Appellate Exhibit 404,
2 which is the government's response to our defense witness list;
3 Appellate Exhibit 408 with declarations, this is our motion to compel
4 filed on 23 November 2012; and Appellate Exhibit 444, which is the
5 government's response to our motion to compel along with their -- I
6 believe -- if I said 444 I meant 445, I apologize -- along with their
7 attachments; and then finally Appellate Exhibit 462, which is an
8 excerpt from AR 27-40 that we request the Court to take judicial
9 notice of.

10 MJ: All right.

11 CDC[MR. COOMBS]: Ma'am, in the -- the defense is seeking to
12 have this Court compel the production of the following witnesses for
13 merits: that is Colonel (retired) Morris Davis; Professor Yochai
14 Benkler; the Fort Leavenworth witness; Mr. Cassius Hall; and Mr.
15 Charles Ganiel. The defense is also seeking for the sentencing phase
16 for the Court to compel the presence of Ms. Lillian Smith, Ambassador
17 Peter Galbraith, and Colonel Dick Larry.

18 Although there are several filings back and forth, I'd like
19 to structure my argument based upon the reasoning provided by the
20 government in its response to our motion to compel dated 12 December
21 2012.

22 The government opposed two witness under R.C.M. 703(b)(1)
23 under a theory that neither were relevant or necessary. Those were

1 Colonel (Retired) Davis and Professor Benkler. As referenced
2 yesterday, the government points to the fact with regards to Colonel
3 Davis that he has not seen the charged DABs, or at least cannot say
4 for certainty that he's seen the charged DABs. They believe that
5 that is a basis for this Court to deny his presence. Although
6 Colonel Davis cannot point to the fact that he's actually viewed the
7 charged DABs, he can say that as the chief prosecutor, he's seen all
8 the DABs during his time period and undoubtedly has seen the charged
9 DABs if they existed prior to 2007, which in this case that is the
10 case.

11 MJ: Does the government agree with that, that these DABs
12 existed prior to 2007?

13 TC[MAJ FEIN]: Your Honor, the government may respond to that in
14 a written filing. The government cannot confirm or deny the dates of
15 the DABs.

16 MJ: All right.

17 CDC[MR. COOMBS]: Colonel Davis can also provide testimony
18 regarding the nature of the information that's charged on the DABs as
19 it existed on or before the dates of the alleged disclosure by PFC
20 Manning, specifically how the DABs were viewed. He will testify that
21 the DABs were not viewed as being particularly sensitive. He will
22 testify that once the DABs were completed they were rarely, if ever,
23 updated, as later administrative or judicial processes developed a

1 much more accurate, complete picture for each detainee. According to
2 Colonel Davis, the DABs were basically referred to as baseball cards.
3 He referred to them as baseball cards since detainees, the
4 information from the DABs were really just to identify the detainees
5 by name and provide some basic background information for them.

6 Although Colonel Davis is not an OCA, he can certainly
7 provide his testimony as to whether there was a reason to believe the
8 DABs could be used for prohibited purposes. His assessment of the
9 DABs ----

10 MJ: Well, what is his expertise for that? He's a prosecutor?
11 CDC[MR. COOMBS]: He is a prosecutor, Your Honor, but he is
12 also an individual who, based upon his training as the Chief
13 Prosecutor for the Commissions, has experience with classified
14 information, had to receive training on how to handle properly
15 classified information, and is aware of how these DABs were viewed as
16 opposed to other information that was also classified. His opinion
17 is that the DABs in this case, if given the ability to testify would
18 be that the information contained within the DABs was not
19 particularly sensitive. He basis that on the fact that in 2006 and
20 in 2007, a time when he was the chief prosecutor, the pentagon
21 released the names of all of the Guantanamo detainees, that's part of
22 the information that's contained within the DABs. Additionally, he
23 will say during this time period, the Pentagon released the results

1 of a combatant status review tribunals, the CSRTs, and administrative
2 review boards, the ARBs, for each detainee. That was something that
3 his office and in particular people working underneath him were
4 responsible for completing.

5 He's familiar with the content of both the CSRTs and the
6 ARBs. He would testify that based upon his position, the content
7 within these documents is much more expansive and much more detailed
8 than any information contained within the DABs. In fact, often
9 times, especially with regards to the CSRTs, the information
10 contained within the DAB is almost repeated verbatim in the CSRTs.
11 That information was released by the government.

12 Again, although he's not seen the charged DABs, the defense
13 obviously has and we would proffer to the Court that at least in
14 regards to one of the charged DABs, a CSRT was completed and
15 released. Those records give information that's almost verbatim to
16 information within the DAB. With regards to the other DABs, those
17 individuals were released prior to the administration doing CSRTs.
18 There was not CSRTs done on them, but there is open source
19 information where they talked openly about their time and what
20 happened to them while they were in Guantanamo. There is also
21 information that was filed in public released files from federal
22 court hearings that contains much, if not all, the information
23 contained within the DABs.

1 MJ: And Mr. Davis is going to be able to testify about all of
2 that?

3 CDC[MR. COOMBS]: Yes, Your Honor. And what he would testify
4 to is based upon this fact, it's his opinion that the information was
5 not closely held by the United States Government because it was not
6 particularly sensitive. His opinion would be that the information in
7 this case could not cause damage to the United States if released.

8 Under our previous argument under 608(c), the defense would
9 assert that Colonel Davis should be permitted to come and testify in
10 order for the defense to offer information that impeaches the opinion
11 of the OCA. In this case, if the government calls an OCA to come in
12 and testify that the DABs actually would cause damage to the United
13 States, certainly Colonel Davis's testimony would impeach that.

14 The Court asked for some cases with regards to 608(c), and
15 the defense just simply said there were several of them. I would
16 give just a couple of cites for the Court's benefit as the Court
17 looks into this issue. *United States v. Moss*, which is 63 M.J. 233
18 and *United States v. Collier*. Both talked about ----

19 MJ: 67 M.J. what?

20 CDC[MR. COOMBS]: 67 M.J. 347, ma'am.

21 MJ: Okay.

22 CDC[MR. COOMBS]: Both cases talk about M.R.E. 608(c).

23 Collier specifically lays out the tests for when the information

1 should be permitted. Essentially what it does is if a reasonable
2 trier of fact would have perceived as significantly different result
3 or impression based upon the witness's testimony if the other
4 evidence was offered, then it should have been offered under 608(c).

5 MJ: I believe I also asked you if you had any cases with -- any
6 other cases with accused or defendants tried under 793(e) with
7 respect to expert testimony outside of OCA's on whether the
8 information could reasonably cause damage.

9 CDC[MR. COOMBS]: You did, Your Honor. I looked to see if I
10 could find anything within military jurisprudence; I could not.

11 MJ: Have you looked in federal jurisprudence?

12 CDC[MR. COOMBS]: All I did with the federal because --
13 granted that that could be ----

14 MJ: That's where most of these cases are tried.

15 CDC[MR. COOMBS]: Right. Because of the nature of -- limited
16 nature of us trying these types of cases. I did not see anything
17 directly on point where you had a defense bring in somebody to
18 directly disagree with an OCA.

19 MJ: Okay. Thank you.

20 CDC[MR. COOMBS]: Now again, the defense's position is that
21 although he's not an OCA, he certainly can come in and do just that,
22 give his opinion. The Court then, at that point, would have the
23 benefit of not only the OCA's opinion and testimony, but also the

1 opinion and testimony of another witness and at that point could
2 freely make its conclusions as to whether or not the information
3 could in fact cause damage to the United States.

4 The fact that the information was not closely held would
5 also, as the government concedes, be relevant to disprove that PFC
6 Manning stole, purloined or knowingly converted a thing of value as
7 charged in Specification 8 of Charge II. Clearly if the information
8 is already freely available, that would undercut any argument that it
9 was a thing of value that was converted.

10 Based upon this argument, the Court should compel the
11 testimony of Colonel Davis.

12 With regards to Professor Yochai Benkler the government
13 takes issue with whether Professor Benkler is actually qualified as
14 an expert. They take issue with him being considered an expert in
15 the history of WikiLeaks and how WikiLeaks was viewed prior to the
16 charged leaks.

17 MJ: Before we even get there, what is the difference how
18 WikiLeaks -- the relevance of how WikiLeaks is viewed? What's the
19 difference in this case if the release was to WikiLeaks or the New
20 York Times?

21 CDC[MR. COOMBS]: The defense would argue there is no
22 difference in that -- between WikiLeaks and the New York Times. Our
23 position here is that Professor Benkler can provide testimony that

1 would assist the defense in presenting a defense both to the Article
2 104 offense and also to the wanton aspect for Specification 1 of
3 Charge II.

4 I'll get to explain those arguments more fully in a moment,
5 but to start off with Professor Benkler being able to be qualified as
6 an expert, he is a Harvard Professor of Law that wrote an article
7 entitled *A Free Irresponsible Press WikiLeaks and the Battle Over the*
8 *Soul of the Network for the State*. As part of that article he
9 conducted extensive research not only on the history of WikiLeaks,
10 but also on the charged document in Specification 15 of Charge II.
11 Additionally, his scholarship in past 10 years has concentrated in
12 the fields of new forms of journalism and their relationship to
13 Internet law, democracy in the network public sphere. He also has
14 written several articles in this area and book chapters in the field.
15 He would clearly qualify as an expert under M.R.E. 702.

16 Again, his testimony would be something that would assist
17 the trier of fact with regards to the Article 104 offense.

18 MJ: How?

19 CDC[MR. COOMBS]: What I would like to do is break it down
20 into two parts, Your Honor. First, whether PFC Manning knowing gave
21 intelligence to the enemy through WikiLeaks. I'll explain that in
22 greater detail. Second, whether PFC Manning had the general evil

1 intent to deal directly or indirectly with an enemy of the United
2 States.

3 Article 104 requires the government to prove that PFC
4 Manning knowingly gave intelligence to the enemy through a third
5 party. In this case, in an indirect way and the government has
6 charged and it appears the only evidence is by just providing that
7 information to WikiLeaks that's the indirect way of getting
8 information to the enemy. Professor Benkler's testimony would help
9 the defense undercut any argument that by simply giving information
10 to WikiLeaks that PFC Manning would have had actual knowledge that he
11 was somehow providing information to the enemy.

12 He will testify that in the 2009, mid 2010 timeframe,
13 WikiLeaks was viewed as a journalistic organization with an
14 impressive history of exposing fraud and corruption within
15 governments and corporations. It was not viewed as a terrorist
16 organization. It was viewed as -- it was not viewed as an
17 organization that was aiding the enemy of the United States. He will
18 testify that during this timeframe, the 2009, early 2010 timeframe,
19 WikiLeaks received numerous awards that recognized its news
20 reporting. He will say that prior to the charged leaks, it was
21 considered to be a legitimate news organization, albeit not a main
22 stream news organization.

1 Based upon his research, he will say that over the course
2 of time between 2006 and 2010, WikiLeaks had released information on
3 a wide range of topics: various governments, various potential
4 corruption within corporations, various malfeasants, or an attitude
5 on different governments, not just the United States. It wasn't an
6 organization that was bent against the U.S. or our way of life. It
7 was simply an organization that was focused on exposing fraud,
8 focused on exposing corruption.

9 As you asked earlier, well what's the difference between
10 releasing something to WikiLeaks and releasing something to the *New*
11 *York Times*? I responded nothing. No one would seriously argue that
12 if you released information to the *New York Times* that you, by that
13 act alone, have aided the enemy. No one would argue that. The same
14 should be true with releasing information to WikiLeaks. If providing
15 information to WikiLeaks, like providing information to the *New York*
16 *Times*, resulted in information getting to the enemy, that in and of
17 itself would not support an Article 104 offense. You need to have
18 more; you need to show actual knowledge that by giving that
19 information to WikiLeaks you had the actual knowledge that you were,
20 in fact, giving information to the enemy indirectly. You show that
21 with some general evil intent to accomplish that.

22 As the Court has previously ruled, you cannot commit this
23 act inadvertently, negligently or accidentally. In this regard,

1 Professor Benkler's testimony helps the defense demonstrate that when
2 -- and help disprove that by providing information to WikiLeaks, that
3 that fact alone would lead one to believe that you're providing
4 information to an enemy of the United States. Instead it would help
5 prove that at least in that time period that if you provided
6 information to WikiLeaks you were providing it to a legitimate news
7 organization.

8 He will say -- Professor Benkler will also provide some
9 testimony that will give some evidence to help support an ignorance
10 or mistake of fact instruction by this Court. Under R.C.M. 916 it
11 is, of course, a defense to the offense of this charge, especially
12 for the actual knowledge prong, that the accused held as a result of
13 some ignorance or mistake an incorrect belief of the true
14 circumstances such that if the circumstances were as the accused
15 believed he would not be guilty of the offense.

16 MJ: Well, how is Professor Benkler going to testify what the
17 accused thinks?

18 CDC[MR. COOMBS]: What he would provide is just some evidence
19 to help corroborate the subjective belief that -- if PFC Manning
20 believed that I was providing information to a legitimate news
21 organization, had no ties to the enemy, if that belief were as PFC
22 Manning believed, then that in and of itself would result in him not
23 being able to be found guilty of an Article 104 offense. If he was

1 under the mistaken belief that, you know, I provided information that
2 could not cause harm to the United States, that's how I selected that
3 information, and I gave that to a legitimate news organization,
4 again, Professor Benkler doesn't connect all the dots, but he
5 provides some evidence in addition to other evidence the defense
6 intends to elicit, that would raise enough evidence for the Court to
7 provide an ignorance or mistake of fact instruction.

8 MJ: Well, the defense would be he selected info that couldn't
9 harm the United States, not that wouldn't harm the United States.

10 CDC[MR. COOMBS]: Correct, Your Honor. So if at the time that
11 was his belief that I selected information that couldn't harm the
12 United States and I provided it to a legitimate news organization and
13 that's the information that's out there, and if somehow that's wrong,
14 you know, the information he selected wasn't in fact information that
15 couldn't cause harm or that this information would get to the enemy,
16 that's the mistake of fact that would apply here. All that would be
17 required is that was an honest belief by PFC Manning because of the
18 fact that at least -- even though it's a general intent offense, you
19 have the actual knowledge requirement and that would raise a
20 *Benchbook* instruction 511-1 in this instance.

21 His testimony is also relevant as to whether PFC Manning
22 acted wantonly when he selected WikiLeaks as the source for the
23 information that he was going to release. If he's releasing

1 information to a legitimate news organization, it is understood that
2 news organizations take steps to verify the information they receive
3 and, if needed, conduct harm minimization. Professor Benkler will
4 testify that WikiLeaks did exactly that in this case. Once they
5 received the information they had, they closely collaborated with the
6 *New York Times*, the *Guardian*, and *Der Spiegel*. They collaborated
7 with them in order to ensure both a controlled and safe release of
8 the information that they received.

9 He will testify that based upon his research, these
10 organizations put their own teams to work to review the information
11 that they had, organizations being the *New York Times*, the *Guardian*,
12 and *Der Spiegel*, and they selected information that was appropriate
13 for publication. Once they actually published the information, then
14 WikiLeaks at the same time published the same information. Obviously
15 this testimony then would be relevant as to whether or not PFC
16 Manning acted wantonly.

17 MJ: Well, how would that testimony be relevant if PFC Manning
18 didn't know that WikiLeaks was going -- is there going to be some
19 evidence that PFC Manning knew that WikiLeaks was going to talk to
20 the *New York Times* and *Der Spiegel* and the *Guardian* and do all of
21 those things?

22 CDC[MR. COOMBS]: No, Your Honor. What it would be is just
23 the evidence that you know you're releasing information to a

1 legitimate news organization. Professor Benkler will testify because
2 they are a legitimate news organization they did what you would
3 expect, and that is verify the information and ensure harm
4 minimization. He will testify -- Benkler will testify that he basis
5 that belief on the facts of his research and that research then ties
6 into the *New York Times*, *Der Spiegel*, and the *Guardian*.

7 He's also relevant as to whether or not there was a reason
8 to believe that the charged information in Specification 15 of Charge
9 II could be used for prohibited purposes. Professor Benkler ----

10 MJ: What type of an expertise does he have to apply on that?

11 CDC[MR. COOMBS]: Right. Professor Benkler will testify that
12 as part of his article he conducted research on the charged document
13 in Specification 15 of Charge II. For the most part he will opine
14 that he was able to verify that most of that product was based upon
15 open source information that was available prior to the creation of
16 the product. In fact, he will say it was based largely on
17 WikiLeaks's own self-description and also upon already publicly
18 available information.

19 His testimony and his analysis of that article will help
20 support help defense's position that PFC Manning did not have a
21 reason to believe that that document could be used for prohibited
22 purposes. Also to corroborate the reasonableness of PFC Manning's

1 belief that, in fact, the document could not be used for the
2 prohibited purposes.

3 Professor Benkler's testimony is the product of reliable
4 principles and methods. He has applied his principle methods
5 reliably to the facts that he would testify in this case. His work
6 has been subject to peer review. We have included the Westlaw
7 citation of his work. It's been cited by numerous other academics.
8 His testimony is supported if the Court looks through his article by
9 research and also by other factual information. By all accounts he
10 would qualify not only as an expert, but also qualify in order to
11 give his opinions that would be relevant to facts and issues in this
12 case. Therefore, the defense would request the Court compel the
13 presence of Professor Benkler.

14 The government in its motion then opposed several other
15 witnesses. Instead of going to the merits witnesses again they broke
16 it down by going to sentencing and then going to opposition of
17 certain witnesses based upon the fact we didn't comply with R.C.M.
18 703(d) or 5 C.F.R. provision. I'll first handle the sentencing
19 witness.

20 The only one in their response, Ambassador Galbraith, they
21 oppose because they believe he did not meet the requirements of
22 R.C.M. 1001(e). The other witnesses that they opposed were for
23 sentencing only case, and I don't believe that that is now an issue

1 to be litigated. They would not be called in a -- like Colonel Davis
2 and Professor Benkler are going to be called in the merits. They're
3 not going to be called in sentencing.

4 MJ: Now, I'm confused. What about the other witnesses: Smith,
5 Larry, Hall?

6 CDC[MR. COOMBS]: They opposed them under not a 703 basis.
7 They opposed them under, "You didn't comply with 703(d) and you
8 didn't comply with 5 C.F.R.," so I'll get to those.

9 MJ: Okay.

10 CDC[MR. COOMBS]: So Ambassador Galbraith is the only
11 sentencing witness that is being opposed under R.C.M. 1001(e) based
12 upon the defense's reading of the government's response motion. The
13 defense's position is Ambassador Galbraith is clearly a mitigating
14 witness, a witness who's going to provide mitigation evidence on a
15 matter of substantial significance to the determination of an
16 appropriate sentence. He will testify that he was with the United
17 States Department as an Ambassador to Croatia from 1993 to 1998.
18 During that time he was also a United State Department of State
19 original classification authority. Further, from 1979 through 1993
20 he was a professional staff member with the Senate Foreign Relations
21 Committee. For 10 years of that period he was responsible for the
22 Senate Department's authorization legislation, an assignment that
23 included being responsible for the oversight and legislation related

1 to the State Department's handling of classified material. He
2 clearly is an individual who understands what he would be testifying
3 about.

4 MJ: Well, does he still understand it? This was back in 1998.
5 CDC[MR. COOMBS]: It is. He would, Your Honor. That is one
6 of the weaknesses that -- or perceived weaknesses that the government
7 tries to raise in its response motion by saying the SIPDIS Tag, the
8 SIPRNET Distribution Tag, was not in existence during his time as an
9 ambassador, and that is true. He will testify that the SIPDIS Tag
10 was not used when he was an ambassador; however, the State Department
11 used wide distribution tags during his time. He will say that the
12 SIPDIS Tag is just that, it's a wide distribution tag. Once the
13 State Department started to use SIPDIS, he will testify that they
14 retroactively applied that to a number of cables that either he or
15 someone in his office drafted. He will say as such he's not -- he is
16 familiar with the type of cable that would be a SIPDIS cable.

17 He will say that SIPDIS cables or cables with such wide
18 distribution do not contain our country's closely held secrets. He
19 will say that the cables were written for a very wide distribution
20 audience; that no prudent diplomat would include generally sensitive
21 information within a SIPDIS cable. He will say that the SIPDIS
22 cables, like other wide distribution cables, reported on either
23 issues that could be easily found within local newspapers, which is

1 verified by another expert or another witness that the defense
2 intends to call, or it's based on administrative matters -- routine
3 administrative matters. So because of that he would say that if it
4 were truly sensitive information that ambassadors would use more
5 restrictive channels, channels that would ensure that only a limited
6 pool of people had access to the cables instead of the access that
7 was granted to anyone who had SIPRNET access to these cables.

8 He will also testify in sentencing that he is concerned and
9 still is concerned with the leakage of classified information.

10 Although he is not a supporter of PFC Manning, he will testify that
11 in his experience that -- and based upon his understanding of the
12 SIPDIS cables that there is no comparison in the sensitivity or
13 importance of the material that was allegedly released by PFC Manning
14 and other material where he's seen actual harm and where there's been
15 no investigation or there has been only limited punishment.

16 He'll say in his experience, most if not all of the State
17 Department cables that have this wide distribution are overly
18 classified. He will also talk about his experience with over-
19 classification.

20 His testimony would clearly meet the requirements of R.C.M.
21 1001(e), and as such the Court should compel his presence during the
22 sentencing phase.

1 Now, a probably more contentious area, I'd like to talk
2 about the other witnesses on the list that are remaining and that is
3 the expert witnesses or the witnesses that we could call as expert
4 witnesses: Mr. Hall, the Fort Leavenworth witness, Mr. Ganiel, Ms.
5 Lillian Smith, and Colonel Dick Larry.

6 Now, with regards to these witnesses the government is
7 opposing them because they believe that we have not complied with
8 R.C.M. 703(d) and we have not complied with 5 C.F.R. Section
9 2635.805. I'd like to discuss each of these beliefs in turn.

10 The first is 703(d). The government argues that we should
11 be required to comply with R.C.M. 703(d) for witnesses that we have
12 listed, but they cite no case law for the Court to support their
13 position. Not only do they not cite any case law, they also ignore
14 the very clear guidance provided in the plain reading of the
15 discussion section of R.C.M. 703(d) and also the realities of Article
16 46 of the UCMJ and just the realities of our military justice system.

17 MJ: What language are you talking about in the discussion?

18 CDC[MR. COOMBS]: In R.C.M. 703(d) the discussion, ma'am, it
19 says that the provision ----

20 MJ: You mean the analysis?

21 CDC[MR. COOMBS]: Yes. It's in the analysis section. It
22 states that the provision does not apply to government employees or

1 individuals who are contracted to provide services that would
2 otherwise fall within this subsection. It's on alpha 21-37.

3 MJ: I see it.

4 CDC[MR. COOMBS]: So that clearly indicates that R.C.M. 703(d)
5 doesn't apply in a situation where the Convening Authority is not
6 being asked to fund the expert. When you look at that you see that
7 the production and employment of an expert witness when it's governed
8 by 703(d) only applies when either the defense or, for that matter,
9 the government is seeking to have an expert produced and have -- and,
10 and this is the important part, have the Convening Authority pay for
11 the expenses of that witness.

12 During an 802 the Court asked the government and the
13 defense would ask the same question for their proffer is, have they
14 complied with 703(d) for any of their government witnesses? Have
15 they gone to the Convening Authority and said, "You know what, 703(d)
16 applies to our government witnesses. We need you to approve of their
17 appointment to the government." The answer to that would be probably
18 a, "No, we haven't done that." The reason why is because there is no
19 reason to do that. They're a government employee.

20 Article 46 and for that matter R.C.M. 703 that codifies the
21 spirit of Article 46, says the defense and the government have equal
22 access to witnesses. If I'm not asking the Convening Authority to
23 pay for the witness and they're a government employee, I have equal

1 access to that witness. I should not be forced to comply with R.C.M.
2 703(d).

3 MJ: Well, let me ask you a question then, looking at Toledo and
4 the cases that the government cited, if you don't comply with 703(d),
5 do you have any attorney client privilege with respect to that
6 witness?

7 CDC[MR. COOMBS]: Yeah, and that's a -- that's the point right
8 there, that's a perfect point. I don't have any attorney client
9 relationship with them. Colonel Dick Larry, the Fort Leavenworth
10 witness, there is no attorney client relationship -- not attorney
11 client, attorney work product. They don't -- they're not appointed
12 to the defense team, they're just a witness that happens to be
13 somebody who could qualify as an expert.

14 MJ: What about the other two?

15 CDC[MR. COOMBS]: The three: Mr. Hall, Mr. Ganiel ----

16 MJ: The other three.

17 CDC[MR. COOMBS]: ---- and Ms. Smith. They were appointed to
18 -- and that might be some of the confusion. They were appointed to
19 the defense team as expert assistants, which also is not under
20 703(d). But in -- usually, if you have someone appointed to you as
21 an expert assistant and you put them on your witness list then you
22 waive the privilege at that point, but we're not asking for them to
23 be appointed to the defense team as expert witnesses either, again,

1 because they're government employees. There would not be a
2 privilege, the government is free to talk to them, and certainly once
3 we put them on the witness list they're free to do that.

4 So the defense's position is that the entire process under
5 R.C.M. 703 doesn't even apply in this situation and that's because
6 the Convening Authority is not being asked to cover any expense of
7 the witnesses. That would be the only reason to go through the
8 R.C.M. 703(d) hurdles.

9 In the event, and the defense would like argue this in the
10 alternative. In the event that the Court would say that 703(d)
11 applies or ultimately that 5 C.F.R. provision prevents a person from
12 testifying as an expert witness where the United States is a party
13 ----

14 MJ: That's what I would like to address. Assume you're right
15 and I find okay 703 only applies where the government has to pay for
16 the witness and the government can cough up a substitute should they
17 want to do that instead and not spend the money. In part of that
18 determination, the government would have the opportunity to say, "I'm
19 evaluating this government witness's time spent as the defense
20 consultant or expert versus his time doing other things." How --
21 assuming that doesn't apply, you still have a C.F.R. provision out
22 there that says in cases where the United States has an interest the
23 employee isn't supposed to be testifying as an expert witness without

1 getting the supervisor's consent or the agency's consent. How does
2 that marry up?

3 CDC[MR. COOMBS]: Yeah. So -- actually, because that's your
4 question I'll answer that question and then maybe work my way back to
5 that answer again. When you look, ma'am, at the C.F.R. provision,
6 we've codified that provision within AR 27-40. That's the section
7 that I've asked the Court to take judicial notice of, but AR 27-40
8 clearly indicates that that provision doesn't apply in courts-
9 martial. When speaking with the Deputy Chief of Litigation Division
10 as the defense's proffer to the Court, we were instructed and
11 informed that they are the office that would approve of DA civilian
12 employees testifying in courts. They do so on a regular basis for
13 federal and state, but they don't do for court-martial and that's
14 because the prohibition doesn't apply in courts-martial.

15 MJ: Have you looked that the -- I believe the case is
16 *Kitmanyen*? Let me get the actual cite. *K-I-T-M-A-N-Y-E-N* Army
17 20110609?

18 CDC[MR. COOMBS]: I don't believe so, Your Honor.

19 MJ: It's 31 October 2011. It involves an FDA witness going to
20 Germany.

21 CDC[MR. COOMBS]: And testifying in a court-martial?

1 MJ: Yes. The FDA said no and that was the issue. The Court
2 went on -- the Army court appears to say, at least that that does
3 applies to other -- to witnesses from other agencies.

4 CDC[MR. COOMBS]: That may be the case from the standpoint of
5 -- like the FDA, I could see the reason why that would apply, because
6 the FDA doesn't have AR 27-40 as being a controlling regulation for
7 them. The witnesses that we are listing all fall within the
8 Department of Army. They're all civilian witnesses that would fall
9 under Department of Army, Department of Defense. In this case AR 27-
10 40 would apply.

11 MJ: That's the thing, I'm looking at -- I'll just bring for the
12 Court's -- the parties' information, I would like -- again, I know
13 you have supplementals due to me on Friday and Tuesday, but look at
14 Kitmanyen it's 31 October 2011, it's a decision, it's an Army Court
15 of Criminal Appeals decision. Also, *United States Court of Federal*
16 *Claims Resources Investments vs. United States of America* 97 FED
17 Claims 545, 17 March 2011. There's an earlier case on that also that
18 you can look at the same *Resource Investments vs. the United States*
19 and earlier cases also relevant, 93 FED Claims 373, 4 June 2010.
20 *United States vs. Lacco*, L-A-C-C-O, 495 F Sub 2d, 581, 2007. That
21 would be district court, Southern District West Virginia.

22 Again, this issue was just brought to the Court's attention
23 late last week, so that's about as far as I got, but I would

1 appreciate both parties' views. Maybe those cases will take you
2 further in that issue.

3 CDC[MR. COOMBS]: Yeah. And without reading those cases
4 though, I do think looking at even the 5 C.F.R. provision, and this
5 will go into the feedback -- fallback position that the defense will
6 be taking.

7 MJ: Mm-hmm.

8 CDC[MR. COOMBS]: But if you look in -- even within the
9 Enclosure 4 of the government's response motion, Enclosure 4 gives
10 the Lexis 5 C.F.R. printout. If the Court goes to page 3.

11 MJ: Give me a minute. Okay.

12 CDC[MR. COOMBS]: So, Your Honor, if you go down to the very
13 bottom of page 3, it indicates that a court rather than the relevant
14 agency is the final authority to determine the applicability of the
15 provision in order to prevent the testimony of an agency employee.
16 The defense would be arguing in this instance that because each of
17 these witnesses fall under Department of Defense/Department of Army,
18 AR 27-40 is the controlling regulation. AR 27-40 comparing the
19 provision that we pulled for the Court with the 5 C.F.R. is clearly
20 the codification of 5 C.F.R.. The litigation division, which would
21 normally be the agency that would provide authority is not the
22 immediate boss of whatever witness you're listing, would opine and
23 indicate based upon the defense's proffer that 27-40 and this

1 provision doesn't apply in a court-martial. There's no granting of
2 authority because there's no need to grant authority.

3 MJ: Would the litigation division under AR 27-40 be the
4 approving authority? Say for example, this provision under 5 C.F.R.
5 was applicable to courts-martial or the witnesses that you have
6 listed here, all of them, would the litigation division be the
7 approval authority for all of them?

8 CDC[MR. COOMBS]: The defenses position would be yes, Your
9 Honor.

10 MJ: Are they all Department of Army witnesses?

11 CDC[MR. COOMBS]: Right. And because of that -- and again,
12 this is a continued issue, the defense has been told that we could
13 apply for an opinion in order to get approval for these witnesses to
14 testify. What we've been told is that we need to give at least 15
15 days' notice, which we're going to have time for that. What I've
16 been told is more than likely your response would be 27-40 section
17 that says it doesn't apply in courts-martial, there's no need for
18 authority, we have no authority to grant you the authority because
19 27-40 doesn't apply, so that may be something ultimately that would
20 assist the Court.

21 We would say even in this situation then when the Court
22 looks to see based upon not only 27-40, but also just the experience
23 of the Court, the defense could find no cited case in its search

1 where this provision: 5 C.F.R. 2635.805, was cited in any case. That
2 in and of itself should speak volumes as to whether or not this is
3 just a very, very creative attempt on the government's part, or this
4 is actually a requirement that would apply in courts-martial. We've
5 been doing this for more than a day or two and you would expect that
6 this issue would come up if it was, in fact, applicable. It wouldn't
7 be an issue of first impression in 2013.

8 For that reason, we would argue that the 5 C.F.R. provision
9 doesn't even apply so that's kind of a red herring. Even if it does
10 apply, let's assume for arguments sake that it does, then this leads
11 to kind of the fallback position of the defense. If the Court looks
12 to page 2 of that same enclosure, Enclosure 4, and it is provision
13 (c) (2) (d), it states, "Nothing in this section prohibits an employee
14 from serving as a fact witness when subpoenaed by an appropriate
15 authority." That would be our fall -- kind of our fallback position.

16 The defense in using each of these witnesses doesn't need
17 to qualify them as experts. I'll explain why we'd want to, but if we
18 didn't qualify them as experts and we just called them as fact
19 witnesses, we could do that. The fact witnesses in this case Colonel
20 Larry would be called as a fact witness to say that the facts are
21 that the SIGACTs in this case did not have counter IED measures
22 detailed in them. He could testify as a fact that the SIGACTs that
23 were released from Iraq and from Afghanistan did not have our counter

1 IED measures detailed within the SIGACTs. We would like to also have
2 him as an expert for an opinion that the SIGACTs were too general and
3 too remote in time and old to be of really unique use to the enemy.
4 That would be the opinion part which we would like to qualify him as
5 an expert witness.

6 With regards to the Fort Leavenworth witness, the fact that
7 he could testify to would be that the Center for Army's Lessons
8 Learned, which is the agency that is responsible for taking issues
9 that happen in real time and doing a rapid response in order to
10 ensure that Soldiers' lives aren't put at risk, the mission is not
11 put at risk, they basically if something happens, like the WikiLeaks
12 release and it's going to impact ongoing missions or put Soldiers'
13 lives at risk, they take that, quickly identify the lessons learned
14 and the prophylactic steps that need to be taken and push that out to
15 the field. The Fort Leavenworth witness can testify to the fact that
16 CALL has never been asked to do that.

17 We'd also like for him to testify as an expert for his
18 opinion that if it were in fact something that would put Soldiers'
19 lives at risk or put mission at risk, that CALL would be the agency
20 that would be doing that. Therefore, the lack of the request
21 indicates probably that information would not have caused either one
22 of those possibilities.

1 Mr. Hall. We can call Mr. Hall as a fact witness to say
2 that he looked at the SIGACTs -- the charged SIGACTs in this case and
3 he did open source research in order to find out whether or not there
4 was information that preceded the release of the charged SIGACTs. So
5 from a fact standpoint he can come testify that yes, he found open
6 source information on the vast majority of the SIGACTs and in many
7 cases the information that was open source was put out by the United
8 States Army.

9 We would like to also then have him as an expert witness
10 testify about the SIGACTs and whether or not in his opinion based
11 upon their time and the remoteness of them, whether or not they could
12 be used to harm the United States, but would not be required.

13 Mr. Ganiel, we would call as a fact witness only. The only
14 reason we would qualify him as an expert is to give the Court
15 background knowledge as to his expertise, but he's not being called
16 to give any expert opinion. It really wouldn't be a requirement to
17 qualify him as an expert. He would testify as a fact witness doing
18 open source on the diplomatic cables, much like ----

19 MJ: And this is who again?

20 CDC[MR. COOMBS]: Mr. Ganiel.

21 MJ: Okay.

22 CDC[MR. COOMBS]: So Mr. Ganiel will testify that he took
23 general unclassified terms from the cables from the standpoint of

1 just a looking at a cable and doing a generalized search that
2 predates the cable's release and in over 90 percent of the --
3 actually 97 percent of the time he found open source information.
4 Many times that open source information provided the majority of the
5 information within the diplomatic cables.

6 We're going to have -- that would be the limit of his
7 testimony. He wouldn't be called then to opine whether or not the
8 cables could be used to harm the United States.

9 Ms. Smith is being called as a fact witness with regards to
10 the IA, the Information Assurance failures that were documented both
11 by the Secretary of the Army's 15-6 Investigation, also by just the
12 criminal investigation in this case. There were various times where
13 there was an Information Assurance failure on the part of PFC
14 Manning's unit to take corrective steps. She can testify as a fact
15 witness with the requisite background of here are the various IA
16 failures.

17 We would like to qualify her as an expert then to inform
18 the Court that based upon these IA failures, how these IA failures
19 could have resulted in these releases never happening had the correct
20 steps been taken. She can lay out the IA failures for the Court and
21 then we would like for her to opine as to what that means from her
22 perspective as an expert, but would not be required to do that.

1 The fallback position would be still asking the Court to
2 compel the presence of each of these witnesses for the fact
3 testimony. That would avoid the issue of 703(d) and also avoid the 5
4 C.F.R. issue because their being called as not experts but fact
5 witnesses. If the Court determines 703(d) does not apply and that 5
6 C.F.R. provision does not apply as well, then we would ask for them
7 to be able to be qualified as expert witnesses.

8 MJ: All right. Thank you. Now, let me -- before defense sits
9 down, Government, other than the 703 -- 703(d) and 505 -- 305.805, is
10 that what it is?

11 CDC[MR. COOMBS]: It is, Your Honor.

12 MJ: Other than those issues, does the government have an
13 objection to producing these witnesses as either fact or expert?

14 ATC[CPT OVERGAARD]: The government ----

15 MJ: I mean, the other witnesses you're saying they're not
16 relevant and they shouldn't come at all.

17 ATC[CPT OVERGAARD]: Yes, ma'am.

18 MJ: These are technical objections. Do you also have similar
19 relevance objections to these witnesses that you had to the earlier
20 ones?

21 ATC[CPT OVERGAARD]: I would have to go through witness by
22 witness. I can do that.

23 MJ: Okay. So you may have to come back.

1 CDC[MR. COOMBS]: Not a problem, Your Honor.
2 Your Honor, I apologize.
3 MJ: That's fine.
4 CDC[MR. COOMBS]: Could we take a brief comfort break.
5 MJ: Certainly. Ten minutes enough?
6 CDC[MR. COOMBS]: Yes, ma'am.
7 MJ: Why don't we start at 20 minutes until 1500 or 3 o'clock?
8 Court is in recess.
9 [The Article 39(a) session recessed at 1528, 9 January 2013.]
10 [The Article 39(a) session was called to order at 1541, 9 January
11 2013.
12 MJ: This Article 39(a) session is called to order. Let the
13 record reflect all parties present when the Court last recessed are
14 again present in court.
15 Captain Overgaard?
16 ATC[CPT OVERGAARD]: Yes, ma'am. The government will try to
17 follow the same order that defense went in ----
18 MJ: Okay.
19 ATC[CPT OVERGAARD]: ---- so it's not confusing hopefully.
20 The government would just also like to add that
21 Appellate Exhibit 459, which was defense's e-mail to the Court on
22 Friday afternoon regarding the 27-40, and then the government's

1 response, which was Appellate Exhibit 460 for the Court's
2 consideration for this motion.

3 The government did object to Colonel Morris Davis, the
4 first witness defense addressed because he -- as the Court pointed
5 out, he is not a subject matter expert on DABs nor is he an
6 intelligence analyst or intelligence professional. He is just a
7 lawyer who was working for OMC as a prosecutor from 2005 to 2007.
8 His limited experience with DABs as a prosecutor does not qualify him
9 to be an expert who would be able to give opinions about his belief
10 that disclosure of charged DABs could not be expected to cause damage
11 to the national security. This is based on what he remembers from
12 looking at a few DABs as an attorney in the 2007 -- 2005 to 2007 time
13 period. His experience doing that does not -- it also doesn't
14 qualify him to testify that DABs contain intelligence because he's
15 not a intelligence professional or intelligence analyst.

16 MJ: But can he -- what's the government's position to respect
17 to his testimony as a fact witness just to say, "I work with DABs;
18 here's what they contain; here's where else they can be found; here's
19 when they were released."

20 ATC[CPT OVERGAARD]: Yes, ma'am. No, the government would not
21 have an objection to that. That wasn't part of the defense's filing,
22 but the government would concede that if he was just called as a fact
23 witness, he could be relevant to both the 793 and 641 charges.

1 MJ: So as a fact witness, the government doesn't object to
2 producing Mr. Morris?

3 ATC[CPT OVERGAARD]: Yes, ma'am.

4 MJ: So the sole question is whether or not he will lay a
5 foundation for an expert opinion?

6 ATC[CPT OVERGAARD]: Yes, ma'am.

7 MJ: Which can be decided at trial, right.

8 ATC[CPT OVERGAARD]: It could, ma'am. Yes.

9 MJ: Okay.

10 ATC[CPT OVERGAARD]: Similarly -- well, not similarly. With
11 Professor Benkler regardless, this has nothing to do with his
12 expertise. Regardless of whether or not Professor Benkler is an
13 expert, he does not have any relevant opinions or testimony to offer.

14 MJ: Let me ask you this: Does the government -- is the
15 government planning on presenting any evidence about the nature of
16 WikiLeaks as an organization, news or otherwise, that it is somehow
17 different from, say the *New York Times* or is the government theory of
18 aiding the enemy that is doesn't matter if it's the *New York Times* or
19 WikiLeaks?

20 ATC[CPT OVERGAARD]: One minute, please.

21 [Pause.]

1 ATC[CPT OVERGAARD]: Thank you, ma'am. On the merits, no, but on
2 sentencing, yes, we may have a witness that will characterize
3 WikiLeaks in that particular manner.

4 MJ: So with respect to the professor's research regarding the
5 history of WikiLeaks and all of that, that resulted in his article,
6 you're saying he's not an expert on WikiLeaks and he's not relevant?

7 ATC[CPT OVERGAARD]: The government is saying that he doesn't
8 have any relevant testimony at least to offer during the merits
9 portion of the trial. There's no -- eliciting testimony that
10 WikiLeaks is a legitimate journalistic organization is not -- it's
11 not circumstantial evidence to show that the accused did not have the
12 requisite intent for the 104 charge. Whether or not WikiLeaks is a
13 legitimate journalistic organization or not is irrelevant as long as
14 the accused had the requisite general evil intent, that is the
15 accused knew he was dealing indirectly with the enemy of the United
16 States.

17 MJ: So that goes back to my original question. Does it make
18 any difference -- if we substituted WikiLeaks for *New York Times*,
19 would the government still be charging this case in the manner that
20 it has and proceeding as you're doing?

21 ATC[CPT OVERGAARD]: Yes, ma'am.

22 MJ: All right. So ----

23 TC[MAJ FEIN]: Ma'am, just follow on to that.

1 MJ: Yes.

2 TC[MAJ FEIN]: Last night over e-mail, ma'am, the United States
3 provided an explanation to the Court and defense that in *U.S. v.*
4 *Batchelor*, that was a legitimate state side newspaper and 104
5 offense. This isn't the first time that Article 104 has been charged
6 for a service member providing information to the enemy through a
7 member of the news media. Whether WikiLeaks is or it's not, so I
8 think that's just -- there is that case law or at least the fact
9 pattern is similar although it was a communication it was still
10 Article 104.

11 MJ: So the government is -- from what you're telling me then
12 and during the merits portion, is the government going to come and
13 say, "Well, WikiLeaks does things this way and this way and this way,
14 and therefore it's more likely that the accused knew -- WikiLeaks
15 acts differently than other news organizations therefore it's more
16 likely that the accused knew that the enemy would be getting this
17 information?"

18 TC[MAJ FEIN]: Yes, Your Honor.

19 MJ: In light of that, what is the government's position
20 regarding Mr. Benkler's -- the relevance of his factual testimony
21 regarding the nature of WikiLeaks?

22 ATC[CPT OVERGAARD]: For the merits portion, ma'am?

23 MJ: Yes.

1 ATC[CPT OVERGAARD]: The government does not think that his
2 testimony would be at all relevant to the 104 charge or the Charge II
3 Spec 1 as proffered by the defense because regardless of whether or
4 not WikiLeaks is a legitimate journalistic organization the
5 government just has to prove that the accused had the requisite
6 general evil intent for the 104 that he knew that he was dealing
7 indirectly with the enemy, regardless of the venue.

8 MJ: Then why would the government need to present evidence --
9 if that's true, then what's the relevance of any government evidence
10 that WikiLeaks is different from these other news organizations and
11 therefore more likely -- is more likely, as I assume -- I guess --
12 Let me ask -- Major Fein answered this question, so I'll direct my
13 question this way. Is that evidence that you're going to introduce
14 on the merits for the purpose of furthering your argument that -- or
15 going to show to prove that the accused knowingly gave intelligence
16 to the enemy through indirect means?

17 TC[MAJ FEIN]: Ma'am, before I answer that question, may we have
18 a quick in place recess?

19 MJ: Yes.

20 [Pause.]

21 TC[MAJ FEIN]: Ma'am, if I may ----

22 MJ: Counsel, if you need additional time to talk about this, we
23 can proceed on to the next witness and go through the rest of

1 witnesses and then take a recess if you all want to confer further
2 before advising the Court of the answer to my question.

3 TC[MAJ FEIN]: Ma'am, I would defer to Captain Overgaard. I
4 think we can answer it now.

5 ATC[CPT OVERGAARD]: Ma'am, the government will withdraw its
6 objection to -- well, it will concede -- the government will concede
7 that Professor Benkler could be a fact witness in this case.

8 MJ: All right. So once again the decision on whether he's an
9 expert -- well, whether he's -- whether in the scope of his expertise
10 can be decided at trial. Is that correct?

11 ATC[CPT OVERGAARD]: Yes, ma'am.

12 MJ: So you don't have any objection to producing him?

13 ATC[CPT OVERGAARD]: No, ma'am.

14 MJ: Okay. Ambassador Galbraith for sentencing, ma'am. He will
15 be -- defense has proffered he will be testifying about his opinions
16 about SIPDIS, which was not even in effect when he was ambassador
17 from 1993 to 1998. He actually left State before SIPDIS Tag was even
18 implemented, so his conclusions regarding SIPDIS are based on his
19 belief of what information a responsible ambassador should protect
20 from further distribution and on his opinion as to what generally
21 sensitive material is. I'm not necessarily -- his testimony does not
22 necessarily relate to the document's actual classification.

1 Although he did have -- he did make general statements on
2 over-classification, as the government argued yesterday and this
3 morning, the government does not believe over-classification is a
4 relevant argument to make in the merits or in sentencing.

5 His testimony regarding the charged cables -- the defense
6 has proffered he could have some testimony regarding the charged,
7 which could be relevant; however, his testimony would be based on
8 information he recalls from his brief stint before SIPDIS was put
9 into place from 1993 to 1998.

10 MJ: In your pleading you say that Ambassador Galbraith's
11 statement that in his experience many State Department cables are
12 over classified and that a secret classification does not mean the
13 information is genuinely secret could be relevant at sentencing. Is
14 it relevant or isn't it relevant?

15 ATC[CPT OVERGAARD]: It could be relevant at sentencing if it's -
16 - a statement like that could be relevant in sentencing if it's --
17 comes out through the appropriate individual, ma'am, but this
18 individual would not be that appropriate individual because he
19 doesn't -- he wasn't even in state when SIPDIS Tag was implemented.
20 He hasn't been privy to any guidance from State about SIPDIS because
21 it occurred after he left. He hasn't been an OCA since 1998.

1 MJ: Did his proffer talk about -- hold on just a minute. Are
2 some of the cables at issue ones pertaining to things -- cables that
3 he was involved in himself?

4 ATC[CPT OVERGAARD]: Ma'am, again, the government can't confirm
5 or deny any charged information.

6 MJ: Okay.

7 ATC[CPT OVERGAARD]: The government does not believe, again, that
8 Ambassador Galbraith would be relevant to sentencing.

9 Moving on the 703 C.F.R. argument.

10 MJ: Mm-hmm.

11 ATC[CPT OVERGAARD]: The government objected to producing all --
12 several witness: Colonel Larry, the Fort Leavenworth witness, Mr.
13 Hall, Mr. Ganiel, and Ms. Smith as the defense had not requested or
14 received the necessary approval to call them as expert witnesses.

15 MJ: Before we get into that discussion.

16 ATC[CPT OVERGAARD]: Yes, ma'am.

17 MJ: The government -- the defense has a fallback position with
18 respect to calling them as fact witnesses only. What, if any
19 objection, does the government have to that?

20 ATC[CPT OVERGAARD]: Yes, ma'am. For Colonel Larry, could
21 potentially testify as a fact witness; however, the government does
22 have some specific objections to the proffer that defense has put
23 forth.

1 MJ: What are your objections to the proffer?

2 ATC[CPT OVERGAARD]: Colonel Larry actually will not say that it
3 is my opinion that intelligence gleaned from this SIGACTs -- the
4 SIGACT reports from Iraq and Afghanistan would be of limited, if any,
5 value to an enemy on counter IED measures. Nor will he say the
6 released SIGACTs are also of limited value due to the date and nature
7 of the information.

8 MJ: Where is this?

9 ATC[CPT OVERGAARD]: It's part of the defense proffers.

10 MJ: Page 1 or page 2.

11 ATC[CPT OVERGAARD]: It is in 2(b), the first sentence, and 2(d),
12 the first sentence.

13 MJ: So you don't agree with that?

14 ATC[CPT OVERGAARD]: No.

15 MJ: And what's 2(b) and what's 2(d), which one?

16 ATC[CPT OVERGAARD]: The first sentence in 2(b) and the first
17 sentence in 2(d).

18 MJ: And these are based on your communications with the
19 witness?

20 ATC[CPT OVERGAARD]: Yes, ma'am.

21 MJ: Taking those two sentences aside, do you agree that he
22 could testify to -- that his testimony would include the rest of this
23 information in the proffer?

1 ATC[CPT OVERGAARD]: Yes, ma'am.

2 MJ: So does the defense -- does the government object to
3 Colonel Larry testifying as to the remainder of the proffer on any
4 grounds?

5 ATC[CPT OVERGAARD]: As?

6 MJ: I mean, do you think -- are you objecting solely on
7 procedural grounds or on relevance grounds?

8 ATC[CPT OVERGAARD]: The government is objecting on procedural
9 grounds, but also on the grounds that -- I mean, without those
10 statements the rest of his testimony is just fact testimony. Any
11 witness could really potentially testify about that, including the
12 witness that the government is calling. It would be potentially
13 cumulative.

14 MJ: So your objection is it's cumulative to ----

15 ATC[CPT OVERGAARD]: Yes, ma'am.

16 MJ: Which witness is the government calling?

17 ATC[CPT OVERGAARD]: Mr. McCarl.

18 MJ: And who's he?

19 ATC[CPT OVERGAARD]: He is the -- let me give you his title.
20 Sorry, ma'am. My witness list is redacted. He's the Chief of the
21 Analytic Center for JIEDDO.

22 MJ: And he would be able to say all of these things that
23 Colonel Larry is saying as fact witness?

1 ATC[CPT OVERGAARD]: The government has gone through and verified
2 each and every sentence, ma'am, so I couldn't ----

3 MJ: All right. So is the testimony that Colonel Larry is going
4 to give, does the government believe it's relevant or not for merits
5 or sentencing? I guess you're using it for both, right?

6 CDC[MR. COOMBS]: No, ma'am. Just for sentencing.

7 MJ: For sentencing? Okay.

8 ATC[CPT OVERGAARD]: Yes, ma'am. The government believes it's
9 relevant for the merits -- sentencing.

10 MJ: All right. So you don't object to producing him except on
11 the procedural grounds?

12 ATC[CPT OVERGAARD]: Yes, ma'am.

13 MJ: Okay. Let's move onto the next one.

14 ATC[CPT OVERGAARD]: Okay. The next one is the Fort Leavenworth
15 witness, ma'am. Again, the government had a specific objection to
16 the proffered testimony, which was the witness will not say, "I would
17 expect that CALL would have received a tasking to conduct rapid
18 process -- to conduct a rapid process if the information disclosed in
19 this case revealed any critical TTPs or vulnerabilities that needed
20 to be addressed in order to avoid loss of life or impact during the
21 operations.

22 MJ: What about the rest of the proffer?

1 ATC[CPT OVERGAARD]: The government does not dispute the rest of
2 the proffer, ma'am.

3 MJ: Does the government dispute that the evidence is relevant?

4 ATC[CPT OVERGAARD]: Yes, ma'am. The government does dispute the
5 relevant of this witness. The fact that CALL has not been requested
6 to collect, analyze or disseminate lessons learned on the WikiLeaks
7 incidents or on the information publicly disclosed in this case does
8 not have any significance and the witness won't testify that it does.
9 There is no evidence that a CALL study would be conducted in response
10 to an isolated misconduct of one Soldier who was caught soon after
11 the misconduct was discovered.

12 The government also doesn't believe that it's relevant to
13 the reason to believe as proffered by the defense. Since the reason
14 to believe is an objective standard, it requires the government to
15 prove that the accused knew facts for which he concluded -- or
16 reasonably should have concluded that the information could be used
17 for the prohibited purpose. An accused alleged subjectively if the
18 information could not be used to the injury of the U.S. or to the
19 advantage of a foreign nation is not relevant to whether or not the
20 accused reasonably should have concluded that the information could
21 be used for that prohibited purpose. More importantly in this case,
22 I mean, the accused didn't know at the time of his misconduct that
23 CALL would not do a study.

1 MJ: Is the Fort Leavenworth witness being called for merits and
2 sentencing or just sentencing?

3 CDC[MR. COOMBS]: The Fort Leavenworth witness, ma'am, we
4 indicated just for merits. If the opinion would be that his
5 testimony would not be relevant to anything on -- in the merits, we
6 would then throw him into sentencing because we believe that
7 obviously for what CALL does that would be relevant for sentencing as
8 well. Right now the idea was to bring him in the merits and have him
9 testify information that came out in the merits we would argue in
10 sentencing. If he is denied as a merits witness for not being
11 relevant then we would supplement our sentencing witness list with
12 his name.

13 MJ: Is this a witness that could potentially testify
14 telephonically?

15 CDC[MR. COOMBS]: Ma'am, he could not only testify
16 telephonically, but he's also potentially a witness that we can
17 stipulate to.

18 ATC[CPT OVERGAARD]: Is that for sentencing, ma'am, or are we
19 talking about for the merits?

20 MJ: Well, why don't we do this: with respect to this
21 particular witness, maybe let's move on, but maybe we can have a
22 brief recess and the parties can confer and see if there can be some

1 kind of resolution to this particular witness that doesn't maybe
2 require a court ruling at this time? Is that possible?

3 CDC[MR. COOMBS]: It's possible, Your Honor, yes.

4 ATC[CPT OVERGAARD]: Yes, ma'am.

5 MJ: Okay. Let's move on.

6 ATC[CPT OVERGAARD]: In regard to Mr. Hall, again the government
7 believes he should not be called as an expert. He could testify as a
8 fact witness though based on the work he has done for the defense.

9 MJ: All right. So you've got no objection to the fact piece of
10 it. It's the expert piece which can be decided at trial?

11 ATC[CPT OVERGAARD]: Yes, ma'am.

12 MJ: Okay.

13 ATC[CPT OVERGAARD]: The same thing goes for Mr. Ganiel and Ms.
14 Smith.

15 MJ: All right. So tell me if I'm looking at this correctly.
16 We have -- at this point has no objection to producing Mr. Davis --
17 basically all of the witnesses except the Ambassador, is that
18 correct?

19 ATC[CPT OVERGAARD]: And potentially the CALL witness, ma'am, the
20 Fort Leavenworth witness.

21 MJ: So those two are still at issue. All right.

22 ATC[CPT OVERGAARD]: The government can clarify its position on
23 the 703 and the C.F.R..

1 MJ: Yes.

2 ATC[CPT OVERGAARD]: Now, the government objected to producing
3 these particular government employees because they haven't been
4 vetted through the chains -- their chains of commands and been
5 appointed as an expert. This issue came up only because defense's
6 own witnesses told us that they were concerned about testifying as
7 expert witnesses. Now, the government has cited in their motion and
8 in the subsequent e-mail, 703(d) as well as some relevant case law or
9 potentially informative case law on the 502 experts as well as cited
10 the JER and the C.F.R..

11 MJ: The case law cited by the government talks about attorney
12 client privilege, doesn't it?

13 ATC[CPT OVERGAARD]: The case law cited by the government does
14 talk about expert consultants in accordance with 502, but the
15 language is informative in that it talks about a service member
16 having no rights at commandeering government experts. It is in
17 relationship to the 502, the attorney client team privilege. The
18 government thinks that that language is in informative because the
19 defense should not be able to just -- as the government shouldn't be
20 able to just grab any expert -- anyone off the government's payroll
21 and designate them as an expert in this case. They should have to go
22 through the appropriate authorities, which is their chain of command,
23 so they know -- so the government knows, the defense knows and all

1 relative parties know that this individual can testify and that it
2 won't take away from their mission and it won't take away from the
3 other things that they should be doing. They may not even be the
4 appropriate individual.

5 The government contends this doesn't normally come up
6 because the defense normally asks the government for these types of
7 experts and doesn't go out and just take government experts on their
8 own.

9 The reading of 703 and the case law and the JER and the
10 C.F.R. seem to point to the fact that the procedure of going through
11 at least a 703(d) procedure directly -- or should at least apply in
12 these cases because ----

13 MJ: Why does the analysis say that it doesn't?

14 ATC[CPT OVERGAARD]: The analysis says that this subsection does
15 not apply to persons who are government employees or under contract
16 to the government to provide services which would otherwise fall
17 within this section. The government contends that that statement is
18 just referring to experts who are employed as -- for the purpose of
19 or contracted by the government simply for the purpose of testifying.
20 It doesn't apply to all government employees.

21 MJ: Now, explain that to me. I don't understand that.

22 ATC[CPT OVERGAARD]: The analysis says the subsection does not
23 apply to persons who are government employees or under contract to

1 the government to provide services which would otherwise fall within
2 this section. Well, the services described within this section are
3 expert witness services.

4 MJ: Yes.

5 ATC[CPT OVERGAARD]: So the government contends that this is
6 saying that that process would not apply to individuals who are hired
7 solely or contracted by the government solely for the purpose of
8 testifying as government witnesses, because that is then their
9 mission and that doesn't take away from any other day job.

10 MJ: So it says, "This subsection does not apply to persons who
11 are government employees or under contract to the government to
12 provide services which would otherwise fall within this subsection.
13 I mean, the subjection -- Does the government disagree that that
14 subjection is in there to require the parties to want the government
15 to spend money to have to go through a process?

16 ATC[CPT OVERGAARD]: The subjection, yes, ma'am. It's M.R.E.
17 703(d), which is the expert witness subsection. It requires the
18 government and defense to go through a process if the government
19 expends money, which -- and the government would frankly argue the
20 government does expend money when even appointing government experts
21 who are already on the government payroll because they have to cover
22 for those individuals in their day jobs and any other requirements
23 that being an expert witness takes away from.

1 MJ: Then why would they have to submit a request to the
2 Convening Authority to authorize the employment and to fix the
3 compensation of the expert?

4 ATC[CPT OVERGAARD]: They have to submit that request so they can
5 get the appropriate funding and vet the appointment of the expert
6 through their chain of command?

7 MJ: I guess that's what I mean. I mean, why would this -- this
8 section -- why would this subsection have all of these criteria if it
9 was meant to apply to government employees?

10 ATC[CPT OVERGAARD]: So that the government and defense could
11 route their requests through the appropriate individuals, which would
12 either be the -- which would be the Convening Authority, which would
13 be the easiest way to do it, and the way that, you know, it's
14 typically done, so the government and defense know the coordination
15 for this individual has been done, so then there are no C.F.R. and
16 JER implications.

17 The government contends this normally doesn't come up
18 because we normally vet these requests through the chains of command
19 so the C.F.R. and JER never become issues in these cases.

20 MJ: Where is the requirement to vet anything through the chain
21 of command in the R.C.M.?

22 ATC[CPT OVERGAARD]: The requirement is to go to the Convening
23 Authority.

1 MJ: So what if the Convening Authority says, "Yes, I appoint
2 this person from X place," and doesn't go through the chain of
3 command. There is no requirement here for them to go through the
4 chain of command.

5 ATC[CPT OVERGAARD]: Well, practically, ma'am, that is what has
6 to happen though because otherwise the Convening Authority doesn't
7 have the power over that individual to appoint them. Practically
8 speaking, the Convening Authority would have to coordinate with the
9 appropriate individual or their designee would have to do so.

10 TC[MAJ FEIN]: Ma'am, may I have a moment?

11 MJ: Yes.

12 [Pause.]

13 ATC[CPT OVERGAARD]: Ma'am, there's also a requirement in R.C.M.
14 703(e)(2) for civilian witnesses. The discussion talks about
15 civilian employees of the Department of Defense ----

16 MJ: Where are you looking, (e)(2)?

17 ATC[CPT OVERGAARD]: I'm sorry, ma'am. Yes, 703(e)(2)(a) and
18 then the discussion that follows.

19 MJ: Okay.

20 ATC[CPT OVERGAARD]: It says, "Civilian employees of the
21 Department of Defense may be directed by appropriate authorities to
22 appear as witnesses in courts-martial as an incident of their

1 employment." There the chain of command for that civilian employee
2 would be the one that's ordering them potentially to appear.

3 MJ: Well, that's just saying they don't need a subpoena.

4 ATC[CPT OVERGAARD]: Yes, ma'am. Because you would go through
5 their appropriate leadership and they would tell them that they had
6 to appear.

7 MJ: I'm not sure I agree with that. I'm looking here at R.C.M.
8 703(e) (2)(f), which basically says if a person is subpoenaed and they
9 -- the person requests relief because it's unreasonable or
10 oppressive, then they come back to the Court.

11 ATC[CPT OVERGAARD]: But for the -- but a subpoena is not
12 necessary for the civilian witnesses because they may be directed by
13 the appropriate authorities.

14 MJ: (2)(f), which basically says if a person is subpoenaed and
15 they -- the person requests relief because it's unreasonable or
16 oppressive, then they come back to the Court.

17 ATC[CPT OVERGAARD]: But for the -- but a subpoena is not
18 necessary for the civilian witnesses because they may be directed by
19 the appropriate authorities.

20 MJ: You go to the agency; you say, "These are the people that
21 we want to come testify," and the agency says, "Well, I don't want to
22 send them." Then you give them a subpoena. This is the Kitmanyen
23 case.

1 ATC[CPT OVERGAARD]: Yes, ma'am.

2 MJ: Okay. So I can tell you now that I'm going to find that

3 703(d) doesn't apply to ----

4 ATC[CPT OVERGAARD]: Okay. Well, the JER and C.F.R. also
5 implicate potential ethical implications involved when a federal
6 employee testifies.

7 MJ: Look at your Enclosure 4 for a moment.

8 ATC[CPT OVERGAARD]: Yes, ma'am.

9 MJ: Look at the case law there.

10 ATC[CPT OVERGAARD]: Yes, ma'am.

11 MJ: What does it say? Those are the cases that I was looking
12 at as well.

13 ATC[CPT OVERGAARD]: The government looked at some of those and
14 then actually some other cases and the circuits seem to be just all
15 over the place in whether or not the C.F.R. applied. There were no
16 military cases on point.

17 MJ: The circuits are split? That would be very nice
18 information for the Court to have. What case law is out there on
19 this?

20 ATC[CPT OVERGAARD]: The one cited by the Court, ma'am. The
21 government didn't cite these cases because there was nothing on
22 military -- in the military justice system and the civilian courts

1 were not all on the same page, so that's why the government didn't
2 cite these cases.

3 MJ: I'm looking at the Kitmanyen, as I understand that case it
4 pretty much says, all right if a subpoena to a government witness --
5 again this is a fact witness, not an expert witness in Kitmanyen so
6 it's not exactly on point, but the court held the subpoena was
7 enforceable in Maryland and the FDA realized that, but not
8 enforceable in Germany because you can't force a civilian witness to
9 go abroad. The part of that case that appears to be instructive is
10 the subpoena is enforceable in Maryland.

11 ATC[CPT OVERGAARD]: Yes, ma'am.

12 MJ: I guess, this is getting confusing to me. In your
13 Enclosure 4, wouldn't this be something that once the employee
14 received the subpoena it would be on the onus on the employee to go
15 to his boss and say, "Look, I've been subpoenaed." Then if the boss
16 has any concerns about that, the boss comes back to the Court and
17 move to quash the subpoena?

18 ATC[CPT OVERGAARD]: That would probably be the practical
19 implication, ma'am, but the government submits it would be much more
20 expeditious if the government made the arrangements with the expert
21 witnesses ahead of time rather than ----

1 MJ: Would it be possible in this case for the government to
2 contact these witnesses' chains of command and just say the defense
3 has requested them for expert testimony and here's what it is?

4 TC[MAJ FEIN]: Absolutely, ma'am. The United States told the
5 defense that in May of this year and the defense refused to submit a
6 request for us to process that. The United States was ready to do
7 that way before this motions hearing, Your Honor. It's only because
8 of this filing that we're here today.

9 MJ: Well, right now you have the defense proffers for all of
10 these witnesses, right?

11 TC[MAJ FEIN]: Yes, ma'am.

12 MJ: So I don't -- this is a technical process. The defense
13 doesn't have to under the rules file a request. They just have to
14 make -- they have to say, "I want this witness as an expert."
15 They're either relevant or they aren't relevant. This is where I
16 make my determinations. Understand the defense can't commandeer
17 another employee. If you want to expedite this process, go to the
18 command. If the commands have problem with any expert testimony from
19 these witnesses, I'm free to listen to them under 703(f), and we've
20 got a lot of time between now and the 3rd of June. We can have that
21 litigation if we need it.

22 Does that work for both sides?

23 ATC[CPT OVERGAARD]: Yes, ma'am.

1 CDC[MR. COOMBS]: Yes, Your Honor.

2 MJ: Do you need any additional information from the defense
3 about what these witnesses will be testifying to?

4 TC[MAJ FEIN]: Ma'am, we'll discuss later and talk to the
5 defense if we do.

6 MJ: Okay. So, I think -- I'm going to rule orally on that part
7 of the motion right now. I don't think 703(d) applies when you're
8 talking about a government employee. The way I'm reading the C.F.R.
9 as well as the R.C.M. 703(e)(2)(f), I think the proper procedure in
10 these kinds of cases, the defense makes a motion for someone to
11 testify as an expert, assuming they're relevant, go back to the
12 person, give them the subpoena, the person goes to their boss and if
13 there's an indication of -- if there is any conflict, I suppose,
14 between the agency doesn't want them to testify, that can all be
15 brought before the Court and we can look at it at that point and it
16 would all be right.

17 ATC[CPT OVERGAARD]: Yes, ma'am.

18 MJ: Does either side have any disagreement with that ruling or
19 at this point want to challenge it?

20 ATC[CPT OVERGAARD]: No, ma'am.

21 CDC[MR. COOMBS]: No, ma'am.

22 MJ: All right. So let's proceed that way and see how that
23 works.

1 ATC[CPT OVERGAARD]: Do you still want the supplemental briefs
2 for next time, ma'am?

3 MJ: On that I probably -- at this point I won't need it. In
4 the event that I do have any agencies coming back to me, this issue
5 may re-raise itself.

6 ATC[CPT OVERGAARD]: Yes, ma'am.

7 MJ: But that action also, again, if there's any issues with
8 respect to ethics and employees violating any JER or other
9 provisions, that should take care of it.

10 CDC[MR. COOMBS]: Ma'am, just briefly on Ambassador Galbraith,
11 that's the only witness that there still is kind of an issue on. I
12 just wanted to address some of the assertions by the government for
13 the benefit of the Court.

14 Although he was only -- they say a short period of time.
15 He was an OCA for the Department of State for 6 years, along with
16 being an Ambassador. From 1979 to 1993, he served in a position that
17 dealt with the State Department and they how they handle classified
18 information as far as that was a part of his job. He does have
19 experience with that.

20 MJ: That was 20 years ago.

21 CDC[MR. COOMBS]: Granted. But even some of the cables and
22 the cables charged in this case deal pre 1998. The SIPDIS Tag that
23 the government is placing a great deal of significance on, as

1 Ambassador Galbraith would testify, it's basically just a new tag
2 that was created in order to share Department of State information
3 with other agencies, as kind of an effect after the 9/11 commission
4 said the government wasn't talking to each other.

5 They went back and they retroactively applied the SIPDIS
6 tag to a lot of cables and then they started using it from that point
7 forward. We've asked for the government to give authorization for
8 Ambassador Galbraith to see the charged cables. Certainly once he
9 sees that he can say, "Yeah, these are the wide distribution cables,
10 certainly the ones previous to 1998, that I'm very familiar with."
11 Also, the SIPDIS Tag now is basically just our wide distribution tag.
12 These are the exact same type of cables.

13 Then he would be in a position, as a former OCA, and also
14 as somebody who has knowledge to then talk about these cable and his
15 opinion as to the type of cables that get the wide distribution tag.
16 This is in sentencing where he's providing testimony for the benefit
17 of the Court in order to gauge well just how bad is the distribution
18 of these charged documents. His testimony along with, when you look
19 at Department of State's own damage assessment, I think then makes
20 this relevant information for the Court to consider when fashioning
21 an appropriate punishment or sentence I should say.

1 MJ: The SIPR wide, he's saying it's just like the distributions
2 that were effect before. Why did they have to have a new one if
3 there was a determination it wasn't being widely enough disseminated?

4 CDC[MR. COOMBS]: The way it goes is what happened is the
5 State Department had wide distribution as far as cables and that was
6 within the State Department and then some of the other agencies they
7 might have shared information with, but they didn't have anything on
8 the SIPRNET. When the determination was made, "Hey, we're going to
9 make stuff available for SIPRNET," that's how SIPDIS became a tag:
10 SIPRNET Distribution. All they did then is take the wide
11 distribution cables and make them available and then every wide
12 distribution cable thereafter was labeled SIPDIS.

13 The government says, "Well, he has no knowledge about the
14 SIPDIS system." The Department of State's own classification guide
15 was released and is available -- it's been available on the
16 Department of State's own webpage that talks about SIPDIS cables and
17 the types of cables that would be within SIPDIS. They say that the
18 only cables that are appropriate there for the SIPDIS Tag are those
19 cables that are appropriate for a wide distribution audience. Not
20 anything that would contain information that should be a more
21 restrictive tag. That's what Ambassador Galbraith will testify to.
22 It's not anything that requires a stretch of logic or a leap of logic
23 on his part in order to say what a SIPDIS cable is.

1 MJ: Where's he located?

2 CDC[MR. COOMBS]: Ambassador Galbraith is in, I believe, East
3 Coast. He's located on the East Coast, ma'am. He travels quite a
4 bit.

5 ATC[CPT OVERGAARD]: Vermont.

6 CDC[MR. COOMBS]: Thank you. He's in Vermont, ma'am.

7 MJ: All right. Is there any disagreement on the proffer with
8 Mr. Galbraith on what he's going to testify to?

9 CDC[MR. COOMBS]: We actually have a signed declaration.

10 MJ: You have a signed declaration by him? Okay. Never mind.

11 All right. With respect to this motion then, the only
12 outstanding issue that we have at this point is Ambassador Galbraith.
13 The expert -- whether the witnesses will testify as experts or merely
14 as fact witnesses will be determined at the trial. The Court will be
15 in a much better position to be able to do that when the witness is
16 actually here and make a proffer on the stand on what their expertise
17 is or isn't. We'll make a decision at that time.

18 CDC[MR. COOMBS]: The other witness issue, ma'am, is the Fort
19 Leavenworth, which we owe the Court whether or not we can agree on a
20 stip of expected testimony or handle it in some other way that would
21 alleviate the need for you to make a ruling.

22 MJ: Is that something that -- we need to take a brief recess
23 because we are going to have to have an R.C.M. 802 conference to talk

1 about the scheduling order and calendar at any point this afternoon,
2 but is that something you think you all can resolve this resolve this
3 afternoon, or do you want to have that tabled for discussion for the
4 16th?

5 CDC[MR. COOMBS]: I'd like to table it. The way I would
6 probably propose that we resolve it, ma'am, is getting the Fort
7 Leavenworth witness on a conference call, having that Fort
8 Leavenworth witness put either in writing or state to us exactly what
9 he would say so that there is not disagreement as to the nature of
10 his statement. Then from that the government and the defense could
11 stipulate to his expected testimony, and then the Court -- if the
12 Court finds that relevant for merits, the defense would be fine with
13 having that as a stip of expected testimony. If the Court determines
14 it's not relevant for the merits but would be relevant for
15 sentencing, the defense also would be fine with a stip of expected
16 testimony for sentencing.

17 MJ: All right. Government, you just heard that. Do you have
18 any objections to what was just proposed?

19 ATC[CPT OVERGAARD]: No, ma'am.

20 MJ: All right. So we'll revisit this then on the 16th.

21 ATC[CPT OVERGAARD]: Yes, ma'am.

1 MJ: Okay. If you have any earlier -- if you come to a
2 resolution earlier or you can't come to a resolution, just send me an
3 e-mail just so I know what's coming.

4 ATC[CPT MORROW]: Yes, ma'am.

5 CDC[MR. COOMBS]: Yes, ma'am.

6 MJ: Is there anything else we need to address today?

7 CDC[MR. COOMBS]: I don't believe, ma'am.

8 TC[MAJ FEIN]: No, Your Honor, other than the case calendar.

9 MJ: All right. So if I recess the Court now, this is recessed
10 until the 16th of January, is that the parties' understanding?

11 TC[MAJ FEIN]: Yes, Your Honor.

12 CDC[MR. COOMBS]: Yes, ma'am.

13 MJ: All right. Once again on the 16th of January, the Court
14 will have an updated case calendar to announce. The next session,
15 again, is the 16th and 17th of January 2013. The follow on session
16 we have to that is the 26th of February through 1st of March 2013. I
17 don't see anything there changing. Do the parties?

18 TC[MAJ FEIN]: No, ma'am.

19 CDC[MR. COOMBS]: No, ma'am.

20 MJ: Court is in recess.

21 [The Article 39(a) session recessed at 1430, 9 January 2013.]

22

1 [The Article 39(a) session was called to order at 1004, 16 January
2 2013.]

3 MJ: This Article 39(a) session is called to order. Trial
4 Counsel, please account for the parties.

5 TC[MAJ FEIN]: Ma'am, all parties when the court last recessed
6 are again present with the following exceptions: Mr. Chavez, court
7 reporter, is absent; Mr. Robertshaw is present as the court reporter.
8 Also, Captain Overgaard is absent; Captain Whyte is present.

9 MJ: All right. I'd like to begin by going over filings that
10 have been made since our last session which was the 8th through the
11 11th January, last week. The parties met with the Court and we came
12 up with a new court calendar. Has that been marked as an appellate
13 exhibit?

14 TC[MAJ FEIN]: Yes, Your Honor, it's been marked as Appellate
15 Exhibit 466.

16 MJ: All right. May I see it, please? [The military judge
17 received AE 466 from the court reporter.] All right, we have this
18 session which is scheduled to continue today and tomorrow and it will
19 depend on how far we get today whether we go through tomorrow. The
20 next session will be the 26th of February through the 1st of March of
21 2013, following that, the next Article 39(a) will be the 10th through
22 12th of April of 2013. The Article 39(a) session after that will be
23 the 21st through the 24th of May of 2013, with the trial scheduled to

1 start on the 3rd of June of 2013. Once again, as we've all seen,
2 this is the calendar to date. Sometimes dates and things can change
3 depending on things that arise during the trial, but that is the
4 current schedule that we intend to follow.

5 Does either side desire to supplement my discussion of the
6 trial calendar?

7 CDC[MR. COOMBS]: No, Your Honor.

8 TC[MAJ FEIN]: No, Your Honor.

9 MJ: All right. Defense, I believe you filed an additional
10 M.R.E. 505(h) notice, is that correct?

11 ADC[MAJ HURLEY]: Yes, ma'am, we did. If I may have a moment,
12 I'm going to ----

13 MJ: Yes.

14 ADC[MAJ HURLEY]: ---- get the number of that from the court
15 reporter. Ma'am, the government indicated to me that it's Appellate
16 Exhibit 468. I'm retrieving the one from the court reporter. 469,
17 I'm sorry. Excuse me. Ma'am, we filed this on 14 January after a
18 conversation that the defense had with the government with respect to
19 a previous 505(h) notice. We meant to make explicit certain things
20 for the government with respect to certain particular witnesses. In
21 addition to that, we wanted to make something explicit which we
22 thought was implicit for a -- our interviews of some specifically
23 identified witnesses in the 505(h) notice.

1 MJ: All right. And then, going back to the trial calendar,
2 Major Hurley, the trial calendar has the 22nd of February as the date
3 for -- as I understand it, the defense is going to have rolling
4 505(h) notices; is that correct?

5 ADC[MAJ HURLEY]: Yes, ma'am. And this is a conversation that
6 we had with the government. So, by agency, everything--we've broken
7 them down into subcategories, but it's basically by agency. Once we
8 complete the witness interviews, we'll turn over the 505(h) notice
9 for those agencies with subcategories with our overall deadline being
10 the 22nd of February.

11 MJ: All right. And, then, Government, you also advised me that
12 when you receive the M.R.E. 505(h) notices that it required 45 to 60
13 days -- or 60 days to coordinate with the agencies, is that correct?

14 TC[MAJ FEIN]: Yes, ma'am, the government anticipates no more
15 than 60 days which is why on the calendar it's programmed for April
16 22nd as the due date for the government's response.

17 MJ: All right. And hence the reason for the movement of the
18 trial from March to June, is that correct?

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: All right. And that was done with the concurrence of both
21 sides, is that correct?

22 TC[MAJ FEIN]: Yes, ma'am.

23 ADC[MAJ HURLEY]: Yes ma'am.

1 MJ: All right. Now, at the last session, we also concluded
2 with argument over the judicial notice requests. I have one from the
3 government involving several documents and some facts that they want
4 the court to take judicial notice of and two from the defense, one
5 for damage assessments and one for over classification, a statute,
6 and congressional hearings. The government had filed an addendum on
7 the day of argument at the last session and the Court had -- and had
8 indicated to the Court a desire to supplement those filings.
9 Government, please announce for the record what you filed.

10 TC[MAJ FEIN]: Ma'am, the United States filed, on the 11th of
11 January 2013, Government's Supplemental Judicial Notice Motion and it
12 has been marked as Appellate Exhibit 467. And then, also, the
13 defense replied -- response, Your Honor, to the Government's
14 Supplemental Judicial Notice on the 15th of January 2013, and that's
15 been marked as -- can I have a moment, ma'am? [Consults with co-
16 counsel.] Ma'am, which has been marked as Appellate Exhibit 468.

17 MJ: All right. And, Defense, didn't you also supplemented your
18 initial filing, is that correct?

19 ADC[CPT TOOMAN]: Yes, ma'am, the initial filing for judicial
20 notice of the damage assessments, the defense said referenced a few
21 things in oral argument. We sent those to the Court. Referenced
22 were: Executive Order 13526 that's already part of the appellate
23 record at Exhibit 248; the other instructions and things that we've

1 referenced are Appellate Exhibit 397 we just added them on to our
2 original motion.

3 MJ: All right. Thank you. And what is the status of the Fort
4 Leavenworth witness?

5 TC[MAJ FEIN]: Ma'am, during the last session the parties agreed
6 that between that session and this session we would work to meet with
7 the Fort Leavenworth witness over a teleconference to work out a
8 potential stipulation of expected testimony. The -- both parties did
9 actually set up that conference call; it was on Monday. However, the
10 conference call did not occur for administrative reasons and both
11 parties are going to work as soon as possible to set that up again
12 and hopefully come to a mutual stipulation of expected testimony for
13 the Court.

14 MJ: Thank you. Would the defense like to supplement that?

15 CDC[MR. COOMBS]: No, Your Honor.

16 MJ: All right, then, in addition to the speedy trial arguments
17 that the Court will hear from both sides, the outstanding issues that
18 remain are the Court's decision with respect to Ambassador Galbraith,
19 the judicial notice issues, the ruling on the government motion to
20 preclude motive which the Court is prepared to announce at this time,
21 and the ruling on the government motion to preclude evidence of over
22 classification and that ties in to the subsequent defense judicial
23 notice for the statute and congressional hearings involving that

1 issue. The Court is going to sever that piece of the judicial notice
2 motion and take those two issues on over classification under
3 continued advisement.

4 So, the plan is I am going to announce the ruling on the
5 government's motion to preclude motion [sic] evidence, that will be
6 followed by argument on speedy trial, and we will take a lunch break
7 at some point, either between the arguments, depending on the time,
8 or after the second argument, and then we will come back on the
9 record and address the Ambassador Galbraith and the judicial notice
10 issues, absent over classification.

11 Ruling: Government Motion to Preclude Motive Evidence on
12 the Merits. On 16 November 2012, the government filed a motion to
13 exclude motive evidence during the merits portion of the trial. On
14 30 November 2012 the defense filed a response opposing the motion.
15 After considering the pleadings, evidence presented, and argument of
16 counsel, the Court finds and concludes as follows:

17 Findings of Fact:

18 1. The accused is charged with one specification of aiding
19 the enemy in violation of Article 104, Uniform Code of Military
20 Justice; one specification of disorders and neglects to the prejudice
21 of good order and discipline and service discrediting in violation of
22 Article 134, UCMJ; eight specifications of violations of 18 United
23 States Code section 793(e) and Article 134, UCMJ; five specifications

1 of violations of 18 United States Code, section 641 and Article 134,
2 UCMJ; two specifications of violations of Article -- Title 18, United
3 States Code section 1030(a)(1) and Article 134; and five
4 specifications of violating a lawful general regulation in violation
5 of Article 92, UCMJ. The time period of the charged offenses is from
6 on or about 1 November 2009 to on or about 27 May 2010.

7 2. The government asserts evidence of motive is not
8 relevant to any charged offense or to any cognizable defense.

9 3. The defense intends to introduce evidence of the
10 accused's motivation during the period of the charged offenses.
11 Defense intends to introduce the accused motivation through the
12 testimony of Adrian Lamo and Zachary Antolak.

13 4. The defense, in its response, argues that evidence of
14 the accused's motive is relevant for two reasons:

15 1. The elements of the charged offenses makes the
16 accused's motive relevant, particularly the element of knowledge in
17 the Specification of Charge I, aiding the enemy, and Specifications
18 4, 6, 8, and 12 of Charge II, stealing, purloining, or knowingly
19 converting records, and the element that the accused wantonly
20 published the information at issue in Specification 1 of Charge II.

21 And, two, to rebut evidence of the accused's intent
22 presented by the government via the testimony of Specialist Jihreah
23 Showman.

1 5. During oral argument, the defense asserted that
2 evidence of the accused's motive was also relevant to the element of
3 whether the accused had reason to believe that the information he
4 communicated would be used to the injury of the United States or to
5 the advantage of any foreign nation for the offenses charged as
6 violations of 18 United States Code, Section 793(e), and that would
7 be Specifications 2, 3, 5, 7, 9, 11, and 15 of Charge II and the
8 offenses charging a violation of 18 United States Code, Section
9 1030(a)(1), Specifications 13 and 14 of Charge II. The defense
10 advised the Court of its intent to present evidence that the accused
11 selected information that he knew or believed could not be used to
12 harm the United States and intended to present evidence to raise a
13 mistake of fact defense to this element in that the accused did not
14 believe the information he communicated could be used to the injury
15 of the United States. The defense further advised the Court of its
16 intent to use the damage assessments to corroborate the
17 reasonableness of the accused's belief.

18 6. The government argues that the accused's motivation is
19 not relevant to the elements of "knowledge" or "wanton publication"
20 and the element "reason to believe the information could be used to
21 the injury of the United States or to the advantage of any foreign
22 nation" is an objective element. As such, the accused's subjective
23 knowledge or belief is irrelevant.

1 The law: M.R.E. 401 defines "relevant evidence." Relevant
2 evidence means evidence having any tendency to make the existence of
3 any fact that is of consequence to the determination of the action
4 more or less probable than it would be without the evidence.

5 2. M.R.E. 402 provides that all relevant evidence is
6 admissible, except as otherwise provided by the Constitution of the
7 United States as applied to members of the Armed Forces, the code,
8 these rules, this manual, or any act of Congress applicable to the
9 members of the Armed Forces. Evidence that is not relevant is not
10 admissible.

11 3. Relevant evidence is necessary when it is not
12 cumulative and when it would contribute to a party's presentation of
13 the case in some positive way to matter at issue.

14 4. Military Rule of Evidence 403 provides that relevant
15 evidence may be excluded if its probative value is substantially
16 outweighed by the danger of unfair prejudice, confusion of the
17 issues, or misleading members, or by consideration of undue delay,
18 waste of time, or needless presentation of cumulative evidence.

19 5. There is a distinction in law between motive and
20 intent. Intent is a person's immediate goal while motive is person's
21 ultimate goal. *United States v. Huet Vaughn*, 43 M.J. 105, Court of
22 Appeals for the Armed Forces, 1995. As an example, a person may
23 steal food from a store to feed his family. His intent is to steal

1 the food. He steals the food to further his motive to feed his
2 family. The fact that he has a noble motive to feed his family does
3 not negate his intent to steal the food. In a prosecution for
4 larceny, the government would have to prove the person's intent to
5 steal. The person's motive to feed his family is relevant only to
6 the extent it provides circumstantial evidence of intent to steal or
7 it presents a viable defense. See *United States v. Diaz*, 69 M.J.
8 127, Court of Appeals for the Armed Forces, 2010; *United States v.*
9 *Rockwood*, 52 M.J. 98, Court of Appeals for the Armed Forces, 1999;
10 *United States v. Huet Vaughn*, 43 M.J. 105, Court of Appeals for the
11 Armed Forces, 1995.

12 6. Similarly, in this case, the accused's motive is
13 relevant only to the extent it provides circumstantial evidence of
14 the accused's intent or presents a viable defense to any of the
15 charged offenses.

16 7. The *mens rea* requirement for 18 United States Code,
17 Section 793(e) does not require that the accused acted in bad faith
18 or with ill intent. *United States v. Diaz*, 69 M.J. 127, Court of
19 Appeals for the Armed Forces, 2010; *United States v. Kiriakou*, 2012,
20 West Law 4903319, Eastern District of Virginia, October 16. Under
21 the same rationale, the *mens rea* requirement for 18 United States
22 Code, Section 1030(a)(1) also does not require that the accused act
23 in bad faith or with ill intent.

1 8. R.C.M. 916(j) governs the defense of Ignorance or
2 Mistake of Fact. The rule provides that it is a defense to an
3 offense that the accused held, as a result of ignorance or mistake,
4 and incorrect belief as to the true nature of the circumstances such
5 that, if the circumstances were as the accused believed them to be,
6 the accused would not be guilty of the offense. If the ignorance or
7 mistake goes to an element requiring premeditation, specific intent,
8 willfulness, or knowledge of a particular fact, ignorance or mistake
9 and need only have exists in the mind of the accused. If the
10 ignorance or mistake goes to any other element requiring general
11 intent or knowledge, the ignorance or mistake must have existed in
12 the mind of the accused and must have been reasonable under all the
13 circumstances. However, if the accused's knowledge or intent is
14 immaterial as to an element, then ignorance or mistake is not a
15 defense.

16 Conclusions of law:

17 1. The accused's motive during the period of the charged
18 offenses, on or about 1 November 2009 to on or about 27 November
19 [sic] 2010:

20 A. Is relevant to the element of knowledge, only whether
21 the accused knew he was cealing with the enemy, for The Specification
22 of Charge I, Aiding the Enemy. This case is distinguished from prior
23 Article 104 cases declining to allow evidence of noble motive or good

1 faith of each used because the accused's bad faith is not an element
2 of Article 104 and because Article 104 is a general intent offense
3 not requiring a specific intent by the accused to aid the enemy. See
4 *US v. Batchelor*, 22 C.M.R. 144, Court of Military Appeals, 1956. The
5 Court agrees, however, in this case, evidence of the accused's motive
6 is relevant to prove whether the accused knew or didn't know he was
7 dealing with the enemy.

8 B. Is not relevant to whether the accused knew he was
9 stealing, purloining, or knowingly converting property belonging to
10 the United States, for Specifications 2, 4, 6, 8, and 12 of Charge 2.

11 C. Is not relevant to whether the accused "wantonly"
12 published information for Specification 1 of Charge II.

13 D. Is not relevant to whether the accused had reason to
14 believe information he communicated could be used to the injury of
15 the United States or to the advantage of any foreign nation for
16 Specifications 2, 3, 5, 7, 9, 11, 13, 14, and 15 of Charge II.

17 2. If the government offers statements made by the accused
18 to Specialist Jihrleah Showman to prove his state of mind, the
19 accused's motive or state of mind during the period of the charged
20 offenses is relevant to rebut that evidence.

21 3. In the Court's 19 October 2012 ruling: Government
22 Motion to Preclude Reference to Actual Harm or Damage on the Merits,
23 the Court deferred ruling on whether lack of actual harm or damage

1 assists in presenting a viable defense. The Court ruling stated, "In
2 order for the Court to appropriately rule on whether actual damage
3 corroborates the reasonableness of the accused's belief, there must
4 be some evidence the accused knew the information could not be used
5 to the injury of the United States or to the advantage of any foreign
6 nation." The Court, now, has sufficient foundation to rule on this
7 issue and believes it would benefit the parties to have clarity on
8 what evidence is relevant and potentially admissible.

9 4. That for the specifications charging violations of 18
10 United States Code, Section 793(e) and 1030(a)(1), the element that
11 the accused had "reason to believe the information he communicated
12 could be used to the injury of the United States or to the advantage
13 of any foreign nation" is an objective element evaluated on facts
14 actually known by the accused. It does not require the government to
15 prove the accused knew the information he communicated could be used
16 to the injury of the United States or to the advantage of any foreign
17 nation. The government must prove that the accused had reason to
18 believe that the information he communicated could be used to the
19 injury of the United States or to the advantage of any foreign
20 nation. Either the accused had reason to believe or he did not. A
21 subjective conclusion by the accused that he did not have reason to
22 believe the information he communicated could be used to the injury
23 of the United States or the advantage of any foreign nation is

1 immaterial to this element. It is also a mistaken conclusion not a
2 mistake of fact. The accused may certainly present evidence of
3 factors he knew regarding the information communicated as evidence
4 that he did not have reason to believe that the information could be
5 used to the injury of the United States or to the advantage of any
6 foreign nation.

7 5. Upon request of the defense, the Court has considered
8 *United States v. Miller*, 874 F.2d 1255, 9th Circuit, 1989. *Miller* is
9 distinguishable from this case in that *Miller* -- the defendant in
10 *Miller* was charged with violating 18 United States Code, Section
11 793(b) with a *mens rea* that the accused acted with intent or reason
12 to believe the information is to be used to the injury of the United
13 States. It is also distinguishable because the case does not involve
14 the affirmative defense of mistake of fact as defined in R.C.M.
15 916(j). The District Court in *Miller* gave the following instruction
16 to the jury: "You may consider whether the defendant acted in good
17 faith and reasonably believed that communication or delivery of the
18 document specified in count two was within the scope of his
19 authorized duties as an FBI agent and actually intended to
20 communicate and deliver that classified document to Svetlana
21 Ogorodnikova as part of his official duties as an ex-FBI agent to the
22 extent that it may bear on whether he had reason to believe the
23 document was to be used to the injury of the United States or to the

1 advantage of any foreign nation." The Ninth Circuit opined that this
2 instruction reflected a misunderstanding of the nature of the
3 accused's defense. The appellate court opined it would have been
4 more appropriate to "instruct the jury to the effect that Miller's
5 reasonable belief, if any, that his actions would have met with
6 subsequent approval from his FBI superiors would be taken into
7 account in deciding whether he had reason to believe that his actions
8 would harm the United States or help the Soviets." Miller is
9 consistent with the reasoning of this court. Any mistaken belief the
10 accused had about the nature of the information communicated is
11 relevant to whether he did or did not have reason to believe the
12 information could be used to the injury of the United States or the
13 advantage of any foreign nation. The Ninth Circuit in *Miller* further
14 held that Miller was not entitled to an instruction that he could not
15 be convicted if his actions were intended to benefit the United
16 States even if he acted with a mistaken but reasonable belief as to
17 the extent of his authority. This is also consistent with the
18 reasoning of this court.

19 6. Evidence that the accused selected only particular
20 information to communicate and factors he knew about that information
21 to select certain information over other information is relevant to
22 the elements of whether the accused had reason to believe the
23 information could be used to the injury of the United States or to

1 the advantage of any foreign nation for the specifications charging
2 violations of 18 United States Code, Sections 793(e) and 1030(a)(1).
3 The accused's subjective conclusion that the information he selected
4 could not be used to the injury of the United States or to the
5 advantage of any foreign nation is not a mistake of fact and does not
6 raise a mistake of fact defense.

7 7. Even if the accused's mistaken conclusion that he did
8 not have a reason to believe that the communicated information could
9 be used to the injury of the United States or to the advantage of any
10 foreign nation raised a viable mistake of fact defense for the
11 element of whether the accused had reason to believe the evidence he
12 communicated could be used the injury of the United States or to the
13 advantage of any foreign nation, the damage assessments would not be
14 relevant to corroborate the reasonableness accused's belief. The
15 relevant inquiry would be facts known by the accused at or before the
16 charged offenses. The damage assessments were created or compiled
17 after the alleged offenses were committed. What, if any, future
18 damage occurred after disclosure was not knowable by the accused
19 during the time period of the charged offenses. Moreover, mitigation
20 measures were implemented by affected agencies to prevent or minimize
21 actual damage. The accused could not have known what, if any,
22 mitigation measures would be taken by the United States Government
23 agencies and what, if any, impact those measures had on actual damage

1 caused. Thus, the damage assessments would not be relevant to
2 corroborate the reasonableness of the accused's belief under Military
3 Rule of Evidence 401. Even if relevant, the probative value of the
4 damage assessments is substantially outweighed by the danger of
5 confusion of the issues under Military Rule of Evidence 403.

6 Ruling: The Government Motion to Exclude Motive Evidence
7 on the Merits is granted in part as set forth above. Evidence of the
8 accused's motive is relevant to the knowledge element of the
9 specification of Charge I, aiding the enemy. It is also relevant to
10 rebut evidence of the accused's state of mind is offered by the
11 government through the testimony Specialist Jihrlea Showman. The
12 accused's motive is not relevant for any other purpose. Evidence of
13 the accused's selection of particular information to communicate and
14 factors considered by the accused in making such selections is not
15 motive evidence and is not excluded by this ruling. The accused's
16 subjective conclusion that he did not have reason to believe the
17 information communicated could be used to the injury of the United
18 States or the advantage of any foreign nation does not raise a
19 mistake of fact defense under R.C.M. 916(j). To the extent any
20 language in the Court's 19 October 2012 ruling is inconsistent with
21 this ruling, this ruling is controlling.

22 So ordered this 16th day of January 2013. And, that would
23 be Appellate Exhibit 470.

1 Do the parties desire a brief recess before we continue
2 with the speedy trial argument or are you ready to go?

3 TC[MAJ FEIN]: Just a brief recess, ma'am.

4 MJ: All right. 10 minutes suffice?

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: All right. Court is in recess until 1040.

7 [The Article 39(a) session recessed at 1029, 16 January 2013.]

8 [The Article 39(a) session was called to order at 1052, 16 January
9 2013.]

10 MJ: This Article 39(a) session is called to order. Let the
11 record reflect all parties present in the court last recessed are
12 again present in court. Government?

13 TC[MAJ FEIN]: Yes, ma'am. Ma'am our roadmap for the
14 government's argument for today, I intend to discuss R.C.M. 707, the
15 law, isolate issues for the Court, and then apply facts to the law,
16 then discuss Article 10, Sixth Amendment right to speedy trial, a
17 focus on the law -- a brief overview of the law, I'll focus the
18 issues for the court and then apply facts to that.

19 First, ma'am, as the Court knows, the first body of law for
20 speedy trial is Rule for Court-Martial 707. Rule for Court-Martial
21 707 provides that the accused will be brought for trial within 120
22 days of preferral of charges, restraint in lieu of arrest, pretrial
23 confinement for entry on Active Duty under R.C.M. 204. Prior to

1 referral, the convening authority may exclude periods of time towards
2 the speedy trial clock or delegate that authority to an Article 32
3 investigation officer under R.C.M. 707(c)(1). R.C.M. 707(c) requires
4 that the proper authority -- convening authority make an independent
5 -- or, excuse me, the investigating officer, if delegated, make an
6 independent determination as to whether there is, in fact, good cause
7 for a pretrial delay and to grant such delays for only so long as
8 necessary under the circumstances.

9 Decisions granting or denying pretrial delays are within
10 the sole discretion of the convening authority or military judge or a
11 deligatee [sic] of the convening authority and it will be subject to
12 review for both abuse of discretion and the reasonableness of the
13 time.

14 First, Your Honor, good cause, the discussion of R.C.M.
15 707(c), says, "Reasons to grant delay might include the following:
16 1. Time to enable counsel to prepare for trial in complex
17 cases.
18 2. Time to allow examination of the mental capacity of the
19 accused.
20 3. Time requested by the defense.
21 4. Time to secure the availability of the accused's
22 substantial witnesses or other evidence.

1 5. Time to obtain appropriate security clearances for
2 access to classified information.

3 6. Additional time for other good cause.

4 Under R.C.M. 707 and viewing the convening authority's
5 decision to delay, the Court also has to determine whether, as stated
6 before, delay is only as long as necessary. In determining whether
7 the time attributable to the delay was necessary under the
8 circumstances, the standard is whether the time taken was reasonable.
9 To put it another way, the standard -- this is from the Air Force
10 Court of Criminal Appeals in *Mahoney*, "The standard is not whether it
11 could have been done sooner, but whether the time it did take was
12 reasonable."

13 Your Honor, the issues for the Court -- the contested
14 period of delay are listed between the two motions, but, briefly, for
15 the Court, six periods: 12 July 2010 to 10 August 2010, 4 March 2011
16 to 22 April ----

17 MJ: Start again. The first one was?

18 TC[MAJ FEIN]: Yes, ma'am. 12 July ----

19 MJ: Okay.

20 TC[MAJ FEIN]: ---- to 10 August 2010.

21 MJ: Okay, got it.

22 TC[MAJ FEIN]: 4 March to 22 April 2011, 22 April to 15 December
23 2011, 24 December 2011 to 2 January 2012, 7 January 2012 to 8 January

1 2012 -- I'm sorry. Yes, ma'am, and the final one, 3 February 2012,
2 the date the case was referred, to 22 February 2012.

3 Two issues for the Court to determine whether the decision
4 to exclude these periods of delay were an abuse of discretion is,
5 again, whether there's good cause for the requested delay and, two,
6 was the period of excludable delay reasonable.

7 First, Your Honor, the -- Colonel Coffman -- the Special
8 Court-Martial Convening Authority, had good cause to exclude periods
9 of delay for the following reasons supported by R.C.M. 707; what the
10 government intends to do, because this has already been extensively
11 briefed in written motions, Your Honor, is really just to focus on
12 the main issues. And the majority of this analysis -- or this
13 argument, excuse me, it's really applicable to all periods of delay
14 and the specifics, of course, are in the written motion. So, first,
15 Your Honor, namely, time for the defense requested, such as the 706
16 board; time to process defense requested security clearances that
17 were required; time to secure evidence that includes forensics,
18 classification reviews, disclosure of classified material and
19 unclassified material, and, later, Your Honor, we'll get into much
20 more detail; time to prepare for the complex case itself; and time
21 for other good cause such as the United State Army, the United States
22 Army MDW, and the Special Court-Martial Convening Authority's
23 command, the Joint Base Myer-Henderson Hall garrison to have an

1 infrastructure in place to support this complex and this very public
2 trial under OPLAN B.

3 Second, Your Honor, period of delay for which the -- which
4 Colonel Coffman, the Convening Authority, excluded was reasonable
5 just because he says his decisions to delay every 30 days through an
6 accounting memorandum and documented. After the R.C.M. 706 was
7 completed, the prosecution requested delays every 30 days based on
8 the facts and processes at the time. Colonel Coffman testified that
9 he elicited input from the defense and considered any submitted
10 submissions. There was no *ex parte* decisions made by the convening
11 authority and Colonel Coffman made independent decisions on each
12 delay and then accounted for them on the written documentation that
13 the Court has already extensively heard testimony and argument on
14 that incorporated, by reference, the prosecution's request and the
15 defense's responses each 30-day period.

16 So, Your Honor, some specific facts supporting good cause
17 for the requested delays, consistent with the R.C.M. 707 discussion,
18 again, in general:

19 The defense's request for the R.C.M. 706 board including
20 three specialized board members and specific medical testing that is
21 not common for all accused in all courts-martial within the
22 Department of Defense or the military. That request was submitted

1 and the convening authority actually executed the request as
2 submitted.

3 Defense's request for delay of the sanity board to comply
4 with prohibitions on disclosure of classified information;

5 Preliminary classification review of the accused's mental
6 health impressions for which the defense provided input and did not
7 object to;

8 Defense's request for security clearances for the defense
9 team, including defense experts which were added throughout the
10 pretrial process;

11 Defense's request for results of OCA classification reviews
12 very early on;

13 And, also, Your Honor, procurement of evidence by the
14 government and, based off of defense's requests to include OCAs
15 reviews of classified information to prove the information was
16 classified as alleged on the charge sheet;

17 Disclosure of unclassified, but protected information,
18 disclosure of classified material.

19 Again, all of that was reviewed and documented by the
20 convening authority in making his decisions. Ma'am, overall, the
21 periods of delay that Colonel Coffman excluded are reasonable.
22 Colonel Coffman was constantly informed, both in writing and in
23 person; that is evidenced by the memoranda he signed every 30 days --

1 excuse me, Your Honor, every 30 days between October 2010 until April
2 2011. And then, as you line up the memoranda, there is the monthly
3 accounting memoranda which was retrospective to just ensure that all
4 the time was accounted for and reviewed and there was the prospective
5 that the government started making requests for additional time
6 starting in April. So, those were off-set. So, the convening
7 authority, in both written documentation and briefing, every,
8 approximately, 15 days, was acting on this case and receiving
9 updates.

10 He was updated -- his updates included the progress being
11 made each of the reasons supporting his decision for a delay.
12 Colonel Coffman's testimony, coupled with his memoranda shows he
13 witnessed constant progress being made for the reasons supporting his
14 decisions to exclude periods of delay and did not feel the need to
15 personally interject himself, as you heard from his testimony.

16 Ma'am, the defense specifically contests the following:
17 First, R.C.M. 706 delays. Colonel Coffman understood the
18 public attention for this case. Colonel Coffman understood the
19 importance of having the R.C.M. 706 board interview the accused on a
20 weekend and directed this to occur. Colonel Coffman, generally,
21 understood the demanding requirements of Walter Reed, where members
22 of the R.C.M. 706 board worked, so he granted extensions based off of
23 coordination of work schedules.

1 Second, preliminary classification review and security
2 clearances for the defense team. Colonel Coffman considered the
3 preliminary classification review, which he ordered, necessary to
4 make an informed decision whether security clearances, up to the Top
5 Secret, SCI-level were required. They are not required just for the
6 defense team, but the prosecution, the Court, are required for the
7 investigating officer and all the support personnel from this point
8 forward. Colonel Coffman mentioned how long it took to get security
9 clearances to the Top Secret, SCI-level and read on, and, unless an
10 expedited system was in place, it would take much longer. And
11 Colonel Coffman acted on multiple defense expert requests, all which
12 Colonel Coffman understood would require TS-SCI clearance with the
13 exception of the forensic experts because there was no SCI forensic
14 material.

15 Your Honor, third, classified evidence and classified
16 discovery. Again, this is the defense specifically requesting these
17 reasons for delay. Colonel Coffman testified that he understood the
18 nature of the charged offenses from the charge sheet. Based on the
19 charged offenses, he understood the necessity to disclose classified
20 information to the defense which, necessarily, required a -- the
21 consent of original classification authorities. Based on the charged
22 offenses, Colonel Coffman understood the necessity to prove the
23 information for which the accused was charged was classified as

1 alleged on the charge sheet which required classification reviews,
2 either -- at least the information be reviewed and some evidence
3 presented at Article 32 for that. Colonel Coffman understood the
4 responsibilities of senior government officials and the challenges of
5 bringing materials to their attention based on his prior assignments
6 at the Pentagon. Colonel Coffman did not have the authority to order
7 agency officials to complete tasks, but did monitor its progress
8 through the trial counsel every 15 days -- every 30 days, Your Honor,
9 starting in October and then every 15 days starting in April 2011.

10 Fourth, and last, Your Honor, OPLAN B. OPLAN Bravo, which
11 still exists today and we're operating under, is -- was planned ahead
12 of time and, its execution -- during that phase -- during the Article
13 32 was triggered by Colonel Coffman's ordering of a restart of the
14 32. Colonel Coffman understood there is great media attention in
15 this case and there's great public intention in this case. He also
16 understood that he was a supported command with very little to no
17 manpower and resources to hold this type of court-martial, or, at the
18 time, an Article 32 in this courtroom with the same infrastructure.
19 Colonel Coffman understood that specialized resources had to be in
20 place despite this being pre-coordinated over the summer and fall and
21 it took 30 days to execute the coordination -- not the coordination
22 started at his order -- but to execute what had been previously
23 coordinated. That included moving the accused from Fort Leavenworth

1 to the local area; establishing this infrastructure we're currently
2 operating in to properly handle the media and public participation;
3 and, establishing proper security for the accused, trial
4 participants, media, public, and informational security.

5 Your Honor, now, the United States moves to Article 10 and
6 the 6th Amendment. Your Honor, the law: Article 10, UCMJ assures
7 the right to a speedy trial and military members by providing that
8 quote when any person subject to this chapter, Article 10, is placed
9 in arrest or confinement prior to trial, immediate steps shall be
10 taken to inform him of the specific wrong of which he is accused and
11 to try him or to dismiss the charges and release him. Military
12 courts have interpreted the immediate steps under Article 10 to mean
13 "not constant motion, but reasonable diligence in bringing the
14 charges to trial."

15 MJ: Does the government conceded that the length of delay in
16 this case would trigger the -- some -- the additional *Barker* analysis
17 under *Schuber*?

18 TC: I'm sorry, could you ask that question again, Your Honor?

19 MJ: Under *Schuber* ----

20 TC: Yes, ma'am.

21 MJ: ---- the Court of Appeals for the Armed Forces to that
22 there had to be a certain period of delay before the additional
23 *Barker v. Wingo* factors are -- before you have to analyze those.

1 TC: Yes, ma'am.

2 MJ: And if the delay is short enough, then you don't have to
3 get to that step because it's not a long enough delay. Does the
4 government concede, in this case, that the delay is long enough to
5 get to the other *Barker* factors?

6 TC: May I have a moment, ma'am? Yes, ma'am, we do. And, in a
7 moment, will get to -- talk now, ma'am -- the reasonableness
8 standard, as you know, from, ma'am, as the Court knows, in *Kossman*,
9 the current reasonableness standard was established away from the
10 *Burton* presumption, although, as we'll discuss -- or ask the court --
11 or excuse me, the government will brief in a moment, even back under
12 the *Burton* standard and pre-*Burton*, there's always been exceptions
13 for complex cases and for security clearances and all the issues --
14 funny enough, in all those cases, typically it is one issue. How
15 this case actually spans every single issue that was essentially been
16 contemplated, other than co-conspirators within the military through
17 all the case law, again, pre -- the current presumption, the previous
18 presumption, and the even pre-dating R.C.M. 707.

19 So, again, Your Honor, military courts interpret immediate
20 steps under Article 10 not to be constant motion or reasonable
21 diligence. And, later, Your Honor, with a relaying of -- or summary,
22 the government actually contends there has been constant motion in

1 this case, although that's not the standard and we'll outline why
2 that is.

3 Your Honor, brief inactivity is not fatal to an otherwise
4 active diligent prosecution, *Schuber*. An Article 10 violation exists
5 where it is established that the prosecution could readily have gone
6 to trial much sooner than some are maturely selected time
7 demarcation, but negligently or spitefully chose not to. Courts
8 agree that there is no magic number to find an Article 10 violation;
9 it is all based off of the facts presented to the court for each
10 case. Article 10 issues cannot be resolved simply by determining
11 whether similar delays would have violated the Sixth Amendment,
12 *Thompson*, CAAF, 2010. The framework to determine whether the United
13 States proceeds with reasonable diligence includes balancing the
14 factors in *Wingo* once you get passed, as you talked about, the
15 presumption just now. Those four factors, length of delay, the
16 reasons for the delay, whether the accused made a demand for speedy
17 trial, and whether there was prejudice to the accused.

18 MJ: Let me stop you there. What was your argument with respect
19 to the interplay between Article 10 and the Sixth Amendment?

20 TC[MAJ FEIN]: Well, ma'am, Article 10 does afford Soldiers,
21 Sailors, and Airmen a greater rights [sic] than Sixth Amendment. If
22 there is an Article 10 violation, there is no reason for the Court to

1 move to the Sixth Amendment. But, the threshold is -- I mean, the
2 law is Article and then it moves into Sixth Amendment if ----

3 MJ: So, I guess what I'm asking you, then, if -- is it the
4 government's position that if do -- that, since Article 10 uses the
5 same factors as the Sixth Amendment, and is more stringent, then
6 Article 10 analysis would necessarily encompass the Sixth Amendment
7 analysis?

8 TC[MAJ FEIN]: Ma'am, in practice, the analysis is the same.
9 The government's contention is is that, if there is an Article 10
10 violation found, there's no reason to go to a Sixth Amendment
11 analysis. If there's no ----

12 MJ: And there would be a Sixth Amendment violation as well?

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: Or an -- yes, the Sixth Amendment.

15 TC[MAJ FEIN]: Well, there could be, Your Honor.

16 MJ: Yes. Okay.

17 TC[MAJ FEIN]: There could be. Hypothetically, there could be
18 no Sixth Amendment, but an Article 10 ----

19 MJ: Yes.

20 TC[MAJ FEIN]: ---- because Article 10 affords more rights to an
21 accused.

22 MJ: Okay.

1 TC[MAJ FEIN]: But, for judicial economy purposes, the findings
2 would be similar and the same for both. So, it's back to four
3 factors. *Mizgala*, Your Honor, C.A.A.F., 2005, these factors from
4 *Barker* are an abstract for examining the facts in an Article 10
5 violation.

6 So, first, Your Honor, length of delay, factor one -- this
7 factor is, to some extent, a triggering mechanism, but unless there's
8 a period of delay that appears, on its face, to be unreasonable under
9 the circumstances, there's no necessity to inquire into other factors
10 to go into that balance, *Cossio*, 2007, CAAF

11 The analysis under the first factor depends upon the
12 circumstances of the case, to include the seriousness of the offense,
13 the complexity of the case, and the availability of proof, *Schuber*,
14 which interpreted *Barker v. Wingo*. Your Honor, actually, from
15 *Barker*, Your Honor, the delay and again, just going back to the
16 constitutional Sixth Amendment case, Your Honor, *Barker* had a 10-
17 month delay just to secure one witness, an ex-sheriff that was sick
18 and unavailable. And then it was a 4-year delay for -- to work out
19 issues of a co-conspirator. The court -- the Supreme Court even
20 found, in *Barker* -- now, I understand it's a Sixth Amendment
21 analysis, alone, not of Article 10, but that 10 months was sufficient
22 for one witness being sick. And that's why the court also, kind of
23 in *dicta*, said the delay can be tolerated. A delay cannot be

1 tolerated for an ordinary street crime, but it's considerably--the
2 waiting process for an ordinary street crime versus a complex
3 conspiracy charge, it gets back to the balancing test.

4 Additional circumstances unique to Article 10 analysis of
5 the first factor are whether the accused was informed of the
6 accusations against him, whether the government complied with the
7 procedures relating to pretrial confinement, and whether the
8 government was responsive to requests or reconsideration of pretrial
9 confinement, *Schuber*.

10 Your Honor, number two, reasons for the delay, the second
11 major factor, again, citing *Barker*, different weight should be
12 assigned to different reasons. In *Barker*, a deliberate attempt --
13 the court, in *dicta*, said, "The deliberate attempt to delay the trial
14 by the prosecution in order to hamper the defense would be weighted
15 heavily against the government." Just to alleviate any concern of
16 the court, there's no evidence that's been presented that that's
17 occurred in this case, a -- nor did it occur.

18 A more neutral reason, such as negligence or overcrowded
19 courts, administrative reasons, should be weighted less heavily, but,
20 nevertheless, should be considered since the ultimate responsibility
21 for such circumstances rests with the government. And then, a valid
22 reason for delay, the Supreme Court held, is such as would be such as
23 missing a witness, would serve to justify appropriate delay. Again,

1 Barker v. Wingo, one witness, 10 months. In determining whether or
2 not delay is reasonable, military courts, again, look to a key
3 component in the diligence determination in Article 10.

4 As I mentioned before, Your Honor, what helps inform this
5 court and helps inform appellate courts, starts with the pre-Burton
6 and the Burton/Marshall-era cases. Now, again, that was when a 90-
7 day presumption was in play that, if a Soldier was not brought to
8 trial within 90 days, this presumption was an Article 10 violation.
9 But, even the courts then, under that presumption, said, "A complex
10 nature of a given case will serve as a sole justifiable basis for
11 finding extraordinary delay if the complexity was proven to cause the
12 delay," US v. Cole, C.O.M.A., 1977. Complexity and investigation
13 and the -- in that case (Cole) Your Honor, was unusual forensic
14 investigation/preparation for trial.

15 Your Honor, in Mizgala, the court held -- was concerned
16 when the government counsel sat in a waiting posture, waiting for
17 formal evidence prior to preferral, waiting for release of
18 jurisdiction from the civilian courts, seeking evidence of off-post
19 offenses, seeking litigation packets for drug offenses. However, the
20 court, even in that case, explained that, even if in a waiting
21 posture, those reasons had to be balanced with all the facts. Ma'am,
22 there's no evidence that the government, in this case, ever sat in a
23 waiting posture during the pretrial life of this case. Certain

1 events or issues had to be resolved, but the case continued to move
2 forward concurrently across all the different lines and the
3 government, later this morning, will be briefing the Court on those
4 different lines and with a summary of the facts for those lines.

5 Your Honor, the defense requests A.C.C.A. held in
6 *McCullough*, where the defense requests government action which
7 necessarily requires reasonable time to answer or accomplish the
8 task, then the defense waives government speedy trial accountability
9 for those periods of time. Also, as recent as *Taylor*, Navy-Marine
10 Corps Court of Criminal Appeals, 2010, the defense may not be a
11 source of a request for government action which necessarily requires
12 time to accomplish, then claim the government is in violation of
13 speedy trial.

14 MJ: Are there any cases, Major Fein, where -- I understand the
15 position of the defense request to delay that's held that delay is
16 reasonable to accomplish what the defense wants. Have there been any
17 cases that, say the defense requests a delay for lengthy reasons,
18 they get a security clearance, whatever, and it takes 4 or 5 months
19 and there's been a charge that the government hasn't moved in those
20 same 4 or 5 months ----

21 TC[MAJ FEIN]: Yes, ma'am. So, two things, Your Honor. First,
22 just to, a point of clarification, if I may, and then I'll answer,
23 directly, your question. *McCullough* and *Taylor*, the United States

1 argues, stands for not necessarily defense requested delays, its
2 defense general requests. "We need this, we need that. Can you do
3 this? Discovery -- we want this in discovery." When the government
4 reacts to defense's requests, pings for information, interacts with
5 the defense and answers it, the government is having motion forward
6 on the case; that's what those ultimately stand for. And what the
7 government will point out in some detail later, in all the emails the
8 Court has had in front of her for quite some time, is that, when
9 that's occurring, there's no apparent inactivity because the defense
10 and prosecution are working towards trial by the prosecution
11 answering it. If I understood your question properly, it was
12 specifically about defense delays. So, Your Honor -- or government
13 responding to defense delay and then possibly sitting in a waiting
14 posture to answer it. Is that accurate?

15 MJ: Well, I guess my question is -- I mean, I see your point
16 about by working to accommodate the defense delay ----

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: ---- I'm just -- I'll give the security clearance for an
19 example to say, okay, you get a security clearance request in
20 January, it's -- the prosecution team does certain things to process
21 the security request, but then it goes somewhere else and somebody
22 else does it.

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: So, if it takes till June for that somebody else to finish
2 it, and the government does nothing from January to June ----

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: ---- in any other area of the case ----

5 TC[MAJ FEIN]: ---- Yes, ma'am.

6 MJ: ---- is there anything that addresses that ----

7 TC[MAJ FEIN]: There's a case directly on point, well ----

8 MJ: And you're throwing out names to me. Are these all on your
9 brief, where I can find the cites?

10 TC[MAJ FEIN]: There are, ma'am, but I'll give the cite right
11 now, also.

12 MJ: Well, what I'd like you to do, then, maybe at the end of
13 the argument, any case that you've referenced and both sides in your
14 briefs, send me just a list of citations so I can find them.

15 TC[MAJ FEIN]: Yes, ma'am, or we'll print them for you if you'd
16 like, then, as well.

17 MJ: That's not necessary, but I can find them with a list.

18 TC[MAJ FEIN]: Yes, ma'am. So, ma'am, directly on point, but
19 not security clearances, but dealing with security issues, U.S. Air -
20 - granted, it's a United States Air Force Court of Military Review,
21 this is *United States v. Mahoney*, excuse me, Your Honor, it's
22 actually *United v. Mahoney and Norse* because it went up -- of how it
23 went up on appeal, but this -- so the cite, here, is 28 MJ 865. Your

1 Honor, in this case, it was a 707 -- although under the old standard
2 -- pretrial confinement Article 10 case. The Air Force had a rule --
3 a regulatory rule that required if an Airman, a member of the Air
4 Force, who had an SCI clearance and access to SCI information, was
5 being prosecuted, that before they could go forward with the
6 prosecution, the United States Air Force, essentially G2, had to
7 approve, they had to send this up through the United States Air
8 Force, administratively, to have the approval. The United States
9 only -- it's not -- it's part of the case, but conjectures about
10 rules in place to ensure there's, you know, the Air Force understands
11 what it's signing up for to prosecute someone with that type of
12 access, but that was a requirement. In this case, Your Honor, 91
13 days were excluded to process SCI approval. And the evidence on the
14 timeline in this case is that, although very little occurred, 15
15 November 1988 up to 14 February 1989 is when the request was
16 submitted, and then 14 February 1989, the request was approved down,
17 all that was occurring at that time, essentially, was the sanity
18 board and then the Article 32 hearing occurred. So there is
19 significant time, as the court -- the Air Force Court of Military
20 Review explains. There was time that, apparently, the waiting
21 posture -- although that term wasn't used back in 1989 -- was there,
22 but even then, they were applying the *Marshall* standard in saying, as
23 an outside agency -- which is interesting about this case is the Air

1 Force court says, "Because the clearance process to prosecute one
2 with an SCI clearance requires Headquarters, Air Force approval, that
3 was considered an outside agency outside of the command, although
4 still part of the Air Force, and because it's outside the control of
5 the command and, thus, the prosecution, it should not be attributable
6 to the prosecution.

7 Now, Your Honor, granted, this is an Air Force court that
8 held this, but it was based off of a Court of Military Appeals case.
9 And, Your Honor, that was *Higgins*, 27 MJ 150, Court of Appeals --
10 excuse me, the U.S. Court of Military Appeals.

11 MJ: All right, stay that -- well, you're going to give me the
12 cite, so it's *Higgins*?

13 TC[MAJ FEIN]: Yes.

14 MJ: Okay.

15 TC[MAJ FEIN]: 27 MJ 150, *United States v. Air Force Captain*
16 *Higgins* and that's where the Court of Military Appeals ruled that --
17 or held -- excuse me -- a request that required outside command
18 requirements were not attributable to the government for speedy trial
19 purposes. So, going back to your original question, Your Honor --

20 MJ: Well, how does that square with the one case where the -- I
21 forgot the name of it, but the sexual assault case waiting for the
22 DNA before going to the 32?

1 TC[MAJ FEIN]: Yes, ma'am, I think that's here. It's *Pyburn* or
2 it's -- it's *Pyburn*, Your Honor. Your Honor, I think this framework
3 is very informative because the original question the Court was, "If
4 all the prosecution was doing was waiting, based off of this outside
5 agency -- or outside command, excuse me, outside command
6 coordination, all that was occurring was the waiting for security
7 clearances, would that be sufficient or would that qualify as Article
8 10?" So, before we keep going, there is no evidence that occurred in
9 this case; multiple lines of approach, but we'll discuss that later.
10 But, specifically, we didn't reference those two cases in *Pyburn*,
11 Your Honor, so *Pyburn* was a Court of Military Appeals case, 1974, the
12 cite is 48 CMR 795, *Pyburn*. And the court held in *Pyburn* that, in
13 this case, there was sufficient evidence -- that's the key to speedy
14 -- one of the many factors that can be weighed for speedy trial
15 violations, but there was specific evidence, the lab results, that
16 was not needed to go forward with the Article 32. There was no
17 reason for the delay because that was not a major piece of evidence;
18 it was a minor piece of evidence. And, specifically, the court
19 states, "Because the medical evidence was marginal at best, we cannot
20 seriously question the relevancy of a laboratory analysis of the real
21 evidence involved." Nevertheless, other strong evidence of guilt was
22 available to the government and we believe investigating officer was
23 not compelled to wait laboratory results before completing statutory

1 duties under Article 32. So the way to interpret that, the United
2 States would argue is that there was still overwhelming evidence to
3 get past an Article 32 and this was not key to the case that the
4 court would -- that -- to that level to annotate that. Those, again,
5 are not factors in this case. The classification reviews, disclosure
6 of the forensic evidence that is the backbone of this case, the
7 different -- the 22 forensic reports, all the classified material
8 that was compromised, how it was compromised. The only evidence that
9 the prosecution could have gone earlier on was a one -- was a chat
10 log admission that the accused made. Other than that, Your Honor, we
11 are clearing all the forensic evidence, up to eight terabytes of
12 information was being cleared and processed both by Army CID, FBI,
13 Department of State Security Services, and then all the OCAs and I'll
14 get into that in a moment, Your Honor.

15 MJ: I'm not a math person, what's a terabyte?

16 TC[MAJ FEIN]: Yes, ma'am. The common explanation of a well,
17 first off, a terabyte is 1000 gigabytes. A gigabyte is 1000
18 megabytes, Your Honor. The old floppy disc we used to use, is 1.4
19 megabytes. But what is typically used by forensic experts is that 10
20 terabytes would equate to the entire printed volume of the Library of
21 Congress as a kind of a measuring stick. So, it's just shy of that
22 at 8 terabytes of forensic data that had to be analyzed in this case.

1 So, again, *Pyburn*, medical lab results that, apparently,
2 were inconsequential to move through an Article 32 and then the
3 Article 32 officer, delayed it. *Pyburn* is also informative to this
4 court, Your Honor, because C.M.R., the Court of Military -- excuse
5 me, C.O.M.A. -- even talked about how the prosecution is responsible
6 for the speedy trial violations. It's not imputed on the other
7 organizations, it's the prosecution. They also held in this case
8 that the Article 32 officer, because the delay incurred occurred by
9 an Article 32 investigating officer.

10 So, Your Honor, we just spoke about defense request, again,
11 not defense request for delay, but defense request for information
12 and others interaction with prosecution.

13 Next, Your Honor, demand for speedy trial, the third
14 factor. A defense request for speedy trial in the midst of a request
15 for a delay does not constitute a bona fide request for speedy trial;
16 that's *McCullough*, 60 MJ 580.

17 MJ: What was that you just said?

18 TC[MAJ FEIN]: Yes ma'am. A defense request for a speedy trial
19 in the midst of a request for a delay by defense does not constitute
20 a bona fide request for speedy trial. Also, demanding a speedy trial
21 demanding a speedy trial now when the defense knows the government
22 cannot possibly succeed only to seek a continuance later when the
23 government is not ready, C.A.A.F. held may, "may believe the

1 genuineness or the initial request." So, just because a written
2 demand is submitted to the convening authority, it still has to be
3 viewed whether it is a legitimate request or not.

4 Fourth, and finally, Your Honor, fourth factor, prejudice.
5 The test for prejudice should be viewed with respect to the interests
6 of speedy trial that the speedy trial right was designed to protect.
7 This is according to the Supreme Court in *Barker*. The three they
8 expressly listed: in order to prevent oppressive pretrial
9 incarceration, to minimize anxiety and concern of the accused, and to
10 limit the possibility the defense will be impaired. Your Honor,
11 justice is frustrated when the accused is held in pretrial
12 confinement for an unreasonably long time, yet merely being in jail
13 is not enough prejudice in the analysis. That's the Air Force Court
14 of Criminal Appeals in *Proctor*, 58 MJ 792. 58 MJ: 792.

15 MJ: What's the name of the case?

16 TC[MAJ FEIN]: I'm sorry, yes, ma'am, *Proctor*, P-R-O-C-T-O-R,
17 Air Force Court of Criminal Appeals, 2003. Your Honor, for purposes
18 of Article 10/Sixth Amendment speedy trial, the Court should focus on
19 one issue in the end: has the trial counsel proceeded with
20 reasonable diligence to bring the accused to trial, taking in
21 consideration the *Barker* factor we just listed. The trial counsel
22 was and continues to be reasonably diligent in bringing the accused
23 to trial on behalf of the command. The overwhelming evidence shows

1 that there was constant motion which goes beyond the Article 10
2 standard of reasonable diligence or colloquially used forward-
3 movement.

4 Now, Your Honor, the prosecution would like to use
5 PowerPoint to kind of get through some major facts and aid the Court.

6 MJ: And you're going to give me a printed copy of the ----

7 TC[MAJ FEIN]: Absolutely, Your Honor.

8 MJ: ---- PowerPoint that you're going to use?

9 TC[MAJ FEIN]: It has already been marked. This is Appellate
10 Exhibit 471.

11 MJ: Thank you.

12 TC[MAJ FEIN]: And, ma'am, you should have it on your screen as
13 well. Your Honor, the government has provided this PowerPoint really
14 as a summary of key facts so that going through this, Your Honor, we
15 would be here for weeks to go through every fact that the government
16 would argue is relevant and that's why we have the written briefs.
17 So, what the prosecution has done is, essentially, providing the
18 defense and the court, ultimately, a copy of this is outline the key
19 facts and have specific citations to every -- so every fact in here
20 has specific citations provided; we'll get through that. What the
21 government does not intend to do is go through every single slide
22 with the court; just highlight key facts for different areas.

1 So, first, Your Honor, the road map for this -- going to
2 talk about, really, a legend to understand how we constructed this
3 summary of the facts for speedy trial. We'll talk about
4 investigation, discovery, the R.C.M. 706 board, security measures,
5 the classification reviews and approvals for disclosure, OPLAN Bravo,
6 and then the actual motions practice include what the defense's
7 alleged periods of apparent inactivity.

8 Your Honor, first, just for understanding, anywhere in this
9 document and during this oral argument where you see the term
10 "chronology," the government is referencing the actual stipulated
11 chronology between the parties, Appellate Exhibit 383. If a citation
12 only references an enclosure with a number next to it, then that's
13 the enclosure to the government's response. So, an example would say
14 -- well, it's -- excuse me. The example is not appellate Exhibit
15 339, that's the government's response; it would be the enclosure
16 number there. For emails that we have provided for the Court, we
17 will provide the enclosure number to the prosecution's response and
18 the email number provided. So, it will say, "Enclosure 1, email
19 number one.

20 MJ: So, Enclosure -- I have Enclosure 1 ----

21 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: Coffman -- Colonel Coffman email, 706 emails, all of those
2 are separate appellate exhibits, so that's what they're going to
3 reference?

4 TC[MAJ FEIN]: Well, no, ma'am. So, what the Court has from the
5 corrected copy of the government's motion with the table of contents
6 is the government has provided, first, in the original motion, two
7 enclosures of emails: Enclosure 1 and Enclosure 2. Enclosure 1 is
8 unclassified emails, Enclosure 2 is classified. Through our witness
9 list litigation and witness testimony, the parties realized that we
10 needed to isolate certain emails and not just have them in random
11 order to make it easier for the Court. So, with the prosecution did
12 is an enclosures list and the corrected copy table of contents,
13 Enclosure 77 are emails that are specifically between the R.C.M. 706
14 board and the parties; that solely are about the R.C.M. 706.
15 Enclosure 78: Colonel Coffman emails. Enclosure 79: Article 32
16 emails. So, this would be emails between the parties and the
17 investigating officer. Enclosure 81 is every email between the
18 defense counsel and prosecution for this case from the day this
19 prosecution received the case here at MDW, 28 July 2010, to the
20 filing of the motion. Every email between the parties and, again,
21 the real focus, there, is about the apparent inactivity to show how
22 there is constant activity. What the government argues is that all
23 categories I have just described are relevant for speedy trial.

1 That's a lot of information. So, what this briefing is going to,
2 hopefully, allow the Court to do is really isolate certain emails for
3 certain periods of time, although they're all there. And, more
4 importantly, Your Honor, if it's a defense email that's in Enclosure
5 1 -- the original Enclosure 1, it's already been replicated in the
6 subsequent enclosures. So, if we are saying "Enclosure 1," here,
7 it's because it's not a defense email, it's not a Colonel Coffman
8 email, it's not an R.C.M. 706 email, it's a unique email that's still
9 in Enclosure 1. So, for a -- we'll list the enclosure number, Your
10 Honor, and then we'll give you the e-mail number next to it. And
11 then, for responses to interrogatories, we'll provide the enclosure
12 and appellate exhibit of that interrogatory and question number.

13 First, Your Honor, this is the different theme lines as you
14 could -- the concurrent theme lines that are occurring in this case,
15 pretrial and now during trial. You have investigation, discovery --
16 I just went over all of those, Your Honor. And what this chart
17 allows the court to see is that -- and, later, Your Honor, because
18 just spacing -- each of these stars will be explained what they are
19 in this oral argument. But what this shows the Court immediately is
20 that there was movement throughout the life of this pretrial case
21 along all these different areas and what it amounts to when you get
22 into the details is, again, constant movement, although that's not
23 the standard.

1 First, Your Honor, investigation; so here's the first
2 investigative line. Now, these are just the most macro-level events
3 that occurred and then the subsequent slides we're going to go
4 through even more detail, but not the minutia.

5 Mr. Lamo's chat with the defense, Your Honor, occurred late
6 May 2010. There were WikiLeaks releases that were starting in 2010
7 and, specifically, at different times; these aren't all of them
8 listed here. A key event, discussed later, is discovery of the SD
9 card, that's a memory card typically found in digital cameras, and
10 then there's even WikiLeaks releases related to this case, Your
11 Honor, post-referral.

12 MJ: This may be a little off ----

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: ---- kilter, but I would like to ask, when talking about
15 WikiLeaks releases, are you talking about through different media or
16 themselves?

17 TC[MAJ FEIN]: Well, Your Honor, it depends. It depends on the
18 timing of the releases, it depends on what the subject matter was.
19 Some of it, you've already heard proffered by the defense during the
20 witness litigation for trial last session that certain individuals
21 would testify that or, excuse me, judicial notice litigation, that
22 certain press entities were releasing material that was given to them
23 by WikiLeaks, but that's one avenue; WikiLeaks did it themselves.

1 And then, even, at some point, the information was fully released by
2 WikiLeaks and others based off of a dispute within WikiLeaks.

3 MJ: Is there anything in the enclosures of the exhibits where I
4 can look to see, I mean, when these things were released, did the
5 investigators know where they came from, or did they have to figure
6 that out?

7 TC[MAJ FEIN]: Every release has been fully investigated, Your
8 Honor, and ----

9 MJ: I mean at the time.

10 TC[MAJ FEIN]: ---- as it's related to this case, that would be
11 in the forensic reports and AIRS and we'll citations in here, Your
12 Honor.

13 To overview the investigation, ma'am, you have the joint
14 criminal investigation between CID and FBI and Department of State
15 Diplomatic Security Services. You have the different WikiLeaks
16 releases; we'll talk about 22 different forensic reports, 3 military
17 intelligence investigations, 3 administrative 15-6s that occurred
18 because of this case.

19 Now, first, for investigation, Your Honor, some key points
20 here: I mentioned, before, but on 25 May 2010, Mr. Adrian Lamo
21 reported that he was online-chatting with the accused and the accused
22 was admitting disclosing thousands of classified documents. The key,
23 here, is that it happened on 25 May, what you'll see from the next

1 two entries, Your Honor, is that within 2 days of that happening,
2 stateside, the United States Army CID was able to notify the command
3 and they were able to put -- to -- without knowing the full details,
4 but enough for probable cause, were able to isolate Private First
5 Class Manning to stop this from continuing to occur. And then, on 30
6 May, Private First Class Manning was ordered into pre-trial
7 confinement and what you'll see, there, for 30 May is the actual
8 military magistrate's finding and that is that, at this time, it was
9 unknown how much information the accused collected or how the
10 information was stored, but enough within a mission that it occurred.
11 So, immediately, the United States government reacted to the report -
12 - the tip, placed Private First Class Manning under arrest and then
13 in pretrial confinement. And then, as you see from the bottom left,
14 Your Honor, "16 June 2010, USDC completed the first of the three AR
15 15-6 Investigations."

16 Next, Your Honor, investigation continuing. The original
17 charges were preferred on 5 July 2010 and then, on 25 July 2010,
18 WikiLeaks releases approximately 76,000 out of 90,000 records from
19 the CIDNE-Afghanistan Database. On 23 August, USFI completed their
20 15-6 investigation. And the next major WikiLeaks release, Your
21 Honor, related to this case, occurred 22 October 2010, with
22 approximately 400,000 records from the CIDNE-Iraq database. Now,
23 this is already in 22 October 2010, of when it's released. On 2

1 November 2010, CCIU recovered, Your Honor, an encrypted SD card I
2 spoke about before, at the accused's aunt's house. And, during its
3 analysis, because it had encrypted information on it, over the
4 Christmas time, that is when CID was able to finally view it and
5 found the entire CIDNE-Afghanistan and Iraq databases on that SD card
6 along with photos of the accused. So, when you look at the
7 investigative time period, although Private First Class Manning first
8 was placed under arrest on 27 May 2010, it wasn't until 2 November
9 2010 that the evidence was fully found and analyzed forensically; two
10 -- or one very key piece of evidence in this case.

11 MJ: So you said it was found on 2 November 2010, and analyzed
12 on 2 November 2010?

13 TC[MAJ FEIN]: No, ma'am. It was collected by agents on 2
14 November 2010 and then it was analyzed subsequent to that in late
15 fall, early winter of 2010. And you'll see from those cited
16 enclosures on how the prosecution was notified of that from CID on
17 the content of it.

18 Additionally, Your Honor, WikiLeaks began releasing
19 purported Department of State cables on 28 November 2010, so, up to
20 28 November 2010, the United States Government did not have a full
21 confirmation that WikiLeaks even had this information other than the
22 evidence that was still being analyzed from Private First Class
23 Manning's computers. The forensics I've talked about already, but

1 this is when it started getting released to truly confirm that it
2 occurred; 28 November 2010, Your Honor. And then, finally, 14
3 February 2011 is when the Secretary of the Army investigation -- the
4 investigating officers concluded his investigation, Lieutenant
5 General Caslen. Your Honor, on 1 March 2011, additional charges were
6 preferred. And then, on 24 April, WikiLeaks began releasing
7 Guantánamo Bay detainee assessment briefs. Again, releases all the
8 way to 20 August 2011, so this is after the additional charges were
9 preferred, WikiLeaks released more than 250,000 reported Department
10 of State cables. 22 September 2011 is when CCIU, Your Honor,
11 completed the classified forensic reports, number 6 through 21.
12 "Finishing it" meaning completing all forensics, marking the
13 documents properly with classified markings, and ready for us to
14 finalize and get produced to the defense. CCIU completed the
15 classified forensic report number 22 on 20 October 2011 and then the
16 Article 32 investigation began on 16 December and then 22 December it
17 ended.

18 MJ: Is there any evidence or information in my -- in the
19 information that you've provided to the Court? Apparently the CID,
20 as I understand it, they found the encrypted SD card on the 2nd of
21 November 2010 and their first analyses came through ----

22 TC [MAJ FEIN]: Yes, ma'am. So, right ----

23 MJ: ---- in June?

1 TC[MAJ FEIN]: No, ma'am, in -- on 2 November 2010, and you'd
2 look in the actual box provided on the slide, enclosure 26, the
3 report SD card, Page 12, that citation ----

4 MJ: Yes.

5 TC[MAJ FEIN]: ---- is the reference for the Court to look at to
6 see the timing and the different analysis that initially was done for
7 the SD card.

8 MJ: All right.

9 TC[MAJ FEIN]: And just to note, Your Honor, when looking at the
10 different forensic reports, they all are co-mingled because it's the
11 same digital forensic evidence; it all stems back to Private First
12 Class Manning's personal Mac computer he had in his CHU that was the
13 main method of transmitting information. So, until that device and
14 other information from his SIPR computer, the other main device used
15 in the workplace, until those were fully analyzed and all the
16 approvals for that information, the rest of the reports could not be
17 disclosed either and we'll get to disclosure approvals later, ma'am.

18 So, ma'am, just to overview again, when we talk
19 investigation, these are the different investigations that are
20 occurring in this case from the day Mr. Lamo reports Private First
21 Class Manning all the way to today and tomorrow with subsequent
22 releases because, even as of today, Your Honor, WikiLeaks has not

1 released material that there is evidence that Private First Class
2 Manning compromised.

3 Now, Your Honor, discovery. Your Honor, this slide --
4 just, again, the macro-slide to show the different themes -- or,
5 excuse me, not the themes, the major issues that are concurrently
6 occurring, is discovery coordination began back in -- with the trial
7 counsel in Iraq and CID, here in the states, during the initial
8 report. There were multiple preservation requests done by law
9 enforcement and the prosecution, PSRs (Prudential Search Requests)
10 were sent and then the prosecution reaches out to 50 different
11 organizations. Again, the -- this is the 50,000-foot level; we'll
12 get to the about 10,000-foot in the subsequent slides. All the green
13 dots or stars, Your Honor, our discovery productions that were done
14 in this case. There is one missing and that was the initial one done
15 in Iraq, but this is all the ones that the prosecution, here in MDW,
16 did and, again, there will be more detail, later, on that.

17 MJ: Okay. I guess I just -- I thought the bulk of the
18 discovery came in November. Is that -- in either October or November
19 ----

20 TC[MAJ FEIN]: No, ma'am, what ----

21 MJ: ---- of 2011.

22 TC[MAJ FEIN]: ---- when you look at sheer numbers -- the number
23 of pages, that is accurate because those are the forensic reports and

1 all their enclosures; it's about 330,000 pages. But, the discovery
2 was rolling from starting on 10 -- I think it's 10 October 2010,
3 we'll get to that in a moment all of our discovery production. But
4 it was on a constant basis starting in October once we actually
5 understood "we" being the prosecution in this case, here at MDW, that
6 understood what information was there, what we had approval to turn
7 over and not, and then whatever we could, we pushed out the door
8 immediately and the emails show that too, between us and defense.

9 So, overview of discovery, Your Honor, it's broken into, of
10 course, to major time periods: pre and post-referral. These are the
11 topics you would cover right now for pre-referral facts. Just to
12 highlight, you just asked about productions, there are 42 pre-
13 referral discovery productions, it's listed in enclosure 18, 33 of
14 unclassified discovery, and 9 productions of classified discovery.

15 For post-referral, Your Honor, there were 42 discovery
16 productions, oddly, up to the point of this -- putting this together,
17 the same number; 18 unclassified and 24 classified. And the goal
18 that the prosecution as outline later in discovery was to provide
19 ultimate transparency to the defense, even in a classified setting.
20 And what's evidenced by that, Your Honor, is the 526,000 plus pages
21 of discovery produced, 437,000 of it was classified, and, in this
22 case, Your Honor, in this case with this amount of information, there
23 is less than one percent of the pages that redactions were applied

1 for purposes of national security or in one document under R.C.M.
2 701(g). The defense received the full disclosure of 99 percent of
3 all the discovery with full access with proper security clearances,
4 facilities, and equipment.

5 So, first, Your Honor, inter and intra-agency meetings;
6 again, this is 10,000-foot mark, just to orient the Court. On early
7 August 2010, Your Honor, trial counsel at MDW began discussions with
8 the FBI, Department of State, DIA, and an OGA, as evidenced -- or
9 cited in Enclosure 57 and Enclosure 3. 13 January 2011, Your Honor,
10 trial counsel began communicating with ODNI and later learned of
11 ODNI's maintaining intel-linked logs, a very key piece of evidence in
12 this case. But it wasn't until January of 2011 that the prosecution
13 or law enforcement became aware of their existence, but it's through
14 the meetings discussing equities that the prosecution and law
15 enforcement learned of this information.

16 Trial counsel first met with NCIS to discuss any records
17 relating to the accused or damage on 2 February 2011. 20 August
18 2011, again, WikiLeaks released more than 250,000 Department of State
19 cables. Well, 10,000-foot, just showing the different type of inter
20 and intra-agency coordination.

21 Search and/or preservation requests: Very first, Your
22 Honor, 30 September 2010, is when CID submitted a Preservation
23 Request at 2/10 Mountain. That's a key event because 2/10 Mountain

1 redeployed from Iraq in late July/August time frame and when they
2 arrived back to Fort Drum, CID was waiting there to search again in
3 the conexes of packed up equipment. They did the initial searches in
4 Iraq; they went back there and that is documented in Enclosure 24 to
5 Appellate Exhibit 16.

6 MJ: And what's the date that Drum -- that the unit redeployed?

7 TC[MAJ FEIN]: Your Honor, the unit started redeploying in late
8 July and they were fully out of Iraq in August 2010.

9 MJ: Okay.

10 TC[MAJ FEIN]: And the conexes arrived -- of course, the conexes
11 arrived weeks after the unit arrived back in CONUS -- arrived on or
12 about that September time frame because CID was there and that's
13 evidenced in the memo we've provided, signed by Special Agent Ames in
14 the Perseveration Request saying, "We searched everything here, but
15 if you find anything else after this point, we want you to preserve
16 it." 25 May 2011 is when this trial counsel team sent what's called
17 the -- we've called the Prudential Search and Preservation Requests
18 to different organizations; we've provided examples to the court and
19 defense. 21 September 2011, defense so, one year, almost one year
20 after CID submitted its Preservation Request, the defense submitted a
21 Preservation Request for hard drives in theater. Those, on 4
22 October, the prosecution sent out multiple -- sent out that request
23 with its own request to implement it and what's been provided to the

1 court in our motion are the different responses including from three-
2 star general, the ARCENT commander, saying there are no theater-
3 property equipment computers remaining that could be identified.
4 There were [sic] a box of hard drives that we have already litigated
5 in this case, found at 2/10 Mountain and CID and FBI had already
6 preserved and we've already produced anything that's relevant any
7 pieces of evidence.

8 Discovery requests: Your Honor, pre-referral discovery
9 requests. The defense has submitted multiple discovery requests, all
10 annotated on the joint chronology. The only thing the prosecution
11 would like to highlight here is every blue line on this timeline is a
12 prosecution discovery production. And when, earlier, I mentioned
13 rolling production, there's slides later that actually list the
14 dates, Your Honor and its Enclosure 16 of the prosecution motion but
15 when you line these up, there were productions occurring the entire
16 time.

17 MJ: Are you producing what they've asked for or something else?
18 TC[MAJ FEIN]: Some of what they ask for, Your Honor, and other
19 -- not what they're asking for if it's not sufficient and the
20 prosecution is responding, not to each individual request, but it
21 does provide consolidated requests explaining, not enough
22 specificity, not a proper legal basis, already produced, does not
23 exist, kind of the buffet of optional answers on what the ground

1 truth is so we know, either what needs to be litigated once we get to
2 Court or what doesn't exist and really help -- ultimately help the
3 defense focus in their requests. Unfortunately, the best of our
4 knowledge, no subsequent requests were submitted with more
5 specificity or a different legal bass. Those were all done later in
6 front of the Court.

7 So, next slide, Your Honor, again, just to highlight, 8
8 November 2011, based on defense requests, that's when the trial
9 counsel presented its case in chief and sentencing case to the
10 defense. So, on 8 November, and you do see the three major
11 productions that occurred right before that, that is when the
12 prosecution sat down with the defense and briefed its entire case;
13 we'll talk about that -- or I'll brief that in a moment, Your Honor.
14 On 18 November was the second briefing, I'll get to that in a moment
15 as well, and on-going discovery productions. Your Honor, this slide,
16 post-referral discovery requests via email. The purpose of this
17 slide is really to show an example to the Court on how the defense
18 made multiple requests, even informal ones over email to the trial
19 counsel throughout the life of the case, but this is just focusing on
20 post-referral and outside the court's knowledge, and the TC answered.
21 So, here is examples of different emails and explaining the standard.
22 "I would like this damage assessment or an unclassified version," back
23 and forth and all of those have been provided to the Court as well

1 with citations. The continuance of that, Your Honor, and just to
2 highlight a few, first, on 27 June 2012, so while we're -- around the
3 time we're in here during an Article 39(a) session, defense requested
4 CYBERCOM records for the first time. On 3 July so, within a week,
5 trial counsel submitted its prudential search requests and
6 preservation to CYBERCOM at that point because that's what defense
7 had requested and found the material of subsequent litigation that
8 ensued. On 12 August 2012, defense inquired what trial counsel
9 viewed as discoverable under Giglio through email and the trial
10 counsel responded what it viewed and defense even requested a copy of
11 our Giglio request that we submitted to agencies to do these
12 background-type searches and the prosecution gave that to the
13 defense; and all that while productions are still occurring.

14 Now, productions, Your Honor, this is really just -- it's a
15 lot on the slide. It's all in Enclosure 18, excuse me, I said 16
16 before. But these are all the different discovery productions and
17 it's much more detailed in Enclosure 18 for the Court, so I'm going
18 to jump through all of these, Your Honor.

19 MJ: Before you do that ----

20 TC[MAJ FEIN]: Yes, ma'am.

21 MJ: ---- I notice here you have on the 11th and 15th of June,
22 the defense is requesting the prosecution prepare and produce

1 unclassified versions of the classified damage assessments. Did that
2 go to the agencies involved?

3 TC[MAJ FEIN]: Yes, Your Honor, it went to the agencies involved
4 and, at that time, the agencies all came back and said "no." I think
5 one agency did provide a summarized version.

6 MJ: Okay.

7 TC[MAJ FEIN]: And of course, that issue might be revisited,
8 depending on current litigation. So, again, discovery productions,
9 Your Honor, Enclosure 18 is the best resource for that. Additional
10 discovery: highlights here, Your Honor, 15 July 2012, so, while we
11 are in -- the case is referred. In addition to searching its own
12 files and the results of prudential search requests, trial counsel
13 affirmatively requested, as I mentioned before, *Giglio* material from
14 government organizations. So, on 22 June 2012, the first government
15 witness list was published and then, within approximately a month of
16 that time, the government asked all the organizations for those
17 witnesses on 15 July and later, depending on who it was from
18 ambassadors to privates to do background searches based off those
19 requests that we shared with the defense later. On 15 October, the
20 prosecution disclosed R.C.M. 914 material to the defense and did it
21 again on 12 December 2012. And the reason the United States
22 highlights that an argument for speedy trial purposes, especially
23 under Article 10, Your Honor, is that there were -- there was great -

1 - the prosecution went through efforts to expedite discovery in this
2 case, considering how complex it is and far-reaching this case is
3 across the United States government. Examples of that is the
4 Prudential Search and Preservation Requests. After the charges --
5 the additional charges were preferred and after the prosecution moved
6 and this is in the prosecution's interrogatory responses, after the
7 initial charges, or the additional charges were preferred -- so then
8 the actual charged documents were identified by the command, I -- the
9 battalion commander who preferred charges, based off his reasonable
10 belief -- or, excuse me, his proximate cause, then the prosecution
11 immediately went to finalize and formalize the classification
12 reviews, which we'll talk about in a moment, then moved for
13 disclosure of evidence. And then the third step, Your Honor, was to
14 get ahead of discovery and ask all the relevant organizations that we
15 had a belief had information related to this case to search their own
16 records, preserve them, and give them to us or make them available
17 for us to review. Now, granted, there is no question litigation in
18 this case that that occurred at different times with the last being
19 the Department of State, but the majority of it -- the super-majority
20 of it was coalesced way before referral and the prosecution could be
21 able to start reviewing it in order to expedite any discovery issues
22 once the case was referred at court-martial.

1 As mentioned before, including efforts to expedite
2 discovery on 8 November and on 18 November, Your Honor, of 2011, the
3 prosecution sat down with PowerPoint for approximately 3 hours and
4 briefed the entire defense team, including their experts. And then,
5 second, with Private First Class Manning, himself, and Mr. Coombs at
6 Fort Leavenworth, the prosecution flew out there to brief the plan of
7 the entire case and all our evidence, 99 percent of our evidence on
8 how we're going to prove these charges as they still stand today, on
9 the charge sheet and ordinary sentencing case to the defense. So,
10 this no question on 8 November 2011, that the entire defense team at
11 that time, although some members have changed, were on notice of any
12 potential discovery issues and what organizations to go to as we
13 presented the forensic reports on 4 November, all the forensic
14 evidence, at that time, and then we explained how we intend to use
15 that; twice. And then, of course, the third time would be a fully
16 contested Article 32 that lasted 9 days. Again, a way to expedite
17 discovery and moving this case forward prior to trial.

18 Post-referral efforts to expedite discovery: R.C.M. 914,
19 Your Honor, as the Court knows, requires disclosure only after a
20 witness testifies because if a witness ends up not testifying, it's
21 not relevant and doesn't have to be disclosed. But the prosecution,
22 in order to minimize delay, voluntarily stood up for this court and
23 the defense and said, "We intend to disclose any 914 material we have

1 ahead of time so there will be no surprises at trial that the -- this
2 prosecution is aware of." And that's a continuing obligation, of
3 course, as we go forward along with Giglio. And then, as I've
4 already mentioned, Your Honor, briefed full disclosure of classified
5 information except for the limited 505(g) litigation that's occurred.

6 Summary of slides, Your Honor: Now, Your Honor, R.C.M. 706
7 board ----

8 MJ: Before we get there ----

9 TC[MAJ FEIN]: Yes, ma'am.

10 MJ: ---- are you going to talk to me at all about the emails
11 for the Article 13 motion?

12 TC[MAJ FEIN]: Yes, ma'am. I guess -- do you have a specific
13 question, Your Honor?

14 MJ: Yes, 64 of them were -- we had a timeline set for that in
15 August. 64 of them were disclosed, I believe it was the day -- the
16 night before the defense had to prepare a response.

17 TC[MAJ FEIN]: Yes -- well, before they actually filed their
18 motion, yes, ma'am.

19 MJ: Okay. Tell me what happened there.

20 TC[MAJ FEIN]: Yes, ma'am. So what happened there, ma'am, is
21 the -- once Private First Class Manning was moved out of Quantico,
22 the prosecution well, the prosecution realized well before Private
23 First Class Manning moved out of Quantico, that there would be a

1 likely Article 10 litigation that would ensue. The defense already
2 said it to us and, even from our own emails to Quantico, said, "You
3 need to make sure your ducks are in a row." So, once he was moved,
4 we submitted a preservation request for all documentation that they
5 would have related to that case. From that point, Your Honor, the
6 summer of 2011, the prosecution received that information and it was
7 received on a rolling basis that culminated in December of 2011.
8 Some of it included emails from certain individuals, others didn't.
9 The prosecution did not, specifically, request emails at all. In
10 fact, the prosecution, other than based off any type of request, has
11 never requested emails in discovery, I simply -- documentation and
12 others. We received that material and, in preparing for Article 13
13 litigation, we reviewed and we disclosed all the material we received
14 the documents, but we did not review the emails because we felt, at
15 that time, Your Honor, there was no reason to spend the time to
16 review the emails if they weren't going to be relevant for any reason
17 and there was no pending defense request for emails from Quantico.
18 Defense requests and I know we've litigated this multiple times, but
19 defense requests are what inform, discovery requests is what informs
20 priorities for the government. Absent a defense request to know
21 exactly what they're looking for, the government -- the prosecution
22 is forced to figure out priorities. And if you look at the timeline,
23 Your Honor, that we're setting out here, when you look at between

1 August 2011 getting the FBI file August 2011, processing over 40,000
2 pages of the FBI classified file in an unprecedented manner. The
3 FBI, typically, never discloses their file to even U.S. attorneys and
4 they gave us a copy to search for Brady processing that, processing
5 what we knew was going to be discoverable DIA material and moving
6 forward for the Article 32, preparing two briefings for the defense,
7 and all the other matters that we're discussing today at the macro
8 level and this briefing and that's evidenced through the file the
9 prosecution had to prioritize and did prioritize. The reason the
10 prosecution looked at the email would be for any other reason and
11 that's for *Giglio* or *Jencks* purposes.

12 When the prosecution had to provide its witness list, the
13 prosecution went through the emails to figure out which witnesses it
14 was going to call or not call as outlined to the Court in previous
15 litigation and that's what occurred. There's no question that it --
16 well -- that -- it happened 2 days before. We notified the defense
17 one day before and he didn't -- emailed them out that night -- late
18 night when defense asked for them immediately, emailed them out,
19 continued reviewing them, and then litigation ensued. So, the
20 prosecution didn't review it because there was no reason to review it
21 because of everything else going on. And then once the requirement
22 became ripe, we did. And that's the point, here, Your Honor, and I

1 think that's the point that's missed. It wasn't -- still was not a
2 defense request for emails.

3 The prosecution reviewed the material affirmatively because
4 we had it, understood its obligation, and did it and then notified
5 the defense we found the material and then litigation ensued. It
6 wasn't a surprise of 914 that we're at trial, the eve of excuse me,
7 the Article 13 motion, Colonel Choike is on the stand and after he
8 testified, prosecution turns around, hands this packet of emails to
9 the defense like this and says, "Here you go," 914.

10 MJ: What's the government's position? Was there any obligation
11 to look at this for any kind of discovery under R.C.M. 701, material
12 of preparation of defense case?

13 TC[MAJ FEIN]: Your Honor, the government would argue when--
14 excuse me one moment, Your Honor. Your Honor, under 701(a)(1), it's
15 papers accompanying charges, convening authority statements. Papers
16 accompany (a)(2), "Documents, tangible objects, reports. Any books,
17 papers, documents, photographs, tangible objects, buildings, or
18 places, or copies of portions thereof, which are within the
19 possession, custody, or control of military authorities," emails are
20 not that. This goes -- this is very -- the government would argue
21 that emails are analogous to statements; that's what 914 talks about.
22 We did this -- we had this litigation in front of this Court for the
23 grand jury testimony. I mean, that is what 914 is there for and

1 that's why -- the point that's missed here is that there were no
2 surprises. Yes, there's no question, in a snapshot of time, because
3 of the unfortunate time, that defense was surprised. The government
4 stipulates to that. And if the defense had asked for more time to
5 file their motion, that would have been fine. Yes, they had pre-sent
6 their exhibit, but the government hadn't opened the exhibits and I
7 don't even think at that point the government had received the
8 exhibits.

9 They could have asked for more time and chose not to. But
10 there was no surprise for the overall court-martial process. The
11 real surprise would have been, again, under the rules that's allowed,
12 to turn around and just hand it over under 914. But, again, the
13 government has tried from the beginning to minimize, to eliminate any
14 surprises and I think that would be a good example of how that
15 occurred prior to testimony of when the surprised reaction occurred.

16 So, Your Honor, going back to R.C.M. 706, again, more --
17 multiple events we'll get into, but----

18 MJ: Well, before you get there, do you believe you had any
19 obligation to search those emails for *Brady* material?

20 TC[MAJ FEIN]: Well, *Brady* wouldn't -- it's Article 13, so, no,
21 Your Honor. I mean, there would be no exculpatory information to --
22 exculpatory information of why Private First Class Manning did or did

1 not commit any violations. We had his weekly reports that we
2 reviewed every week from the -- from Quantico that summarized it.

3 Now, if they say he made a confession that said he did it
4 or didn't do it, then sure, there would probably be something we
5 would -- we had no notice that were no, I think, reasonable belief it
6 would exist and sentence mitigation there's no evidence that they
7 have any it's Article 13, again, Your Honor. It's not evidence that
8 minimized his sentence. Granted, Article 13 minimizes sentence, but
9 not for *Brady* purposes.

10 MJ: Okay.

11 TC[MAJ FEIN]: So, Your Honor, overall, the Iraq trial counsel
12 and chain of command searched for a provider in Iraq. Private First
13 Class Manning was moved to MDW, the prudential or, excuse me, the
14 preliminary classification review was ordered, it was concluded at
15 the end of December, and the 706 concluded in April. Now to get to
16 more details, the 706, the defense requested. There had to be a
17 search for facility and board members.

18 Now, some specific highlights here, Your Honor, on 11 July
19 2010, defense -- the prior defense counsel in this case, in Iraq,
20 requested a delay of the Article 32 for the R.C.M. 706. On 11 July,
21 the Article 32 IO denied that request. On 12 July, the defense
22 requested it again and it was approved by the Special Court-Martial
23 Convening Authority in Iraq. On 12 July excuse me. As you can see,

1 Your Honor, in Iraq, the trial counsel and command tried to assemble
2 R.C.M. 706 in theater but they could not without affecting combat
3 operations and they reached out to find an alternate location to hold
4 the 706, to have the requisite board members. That is one of the two
5 contributing reasons that Private First Class Manning was moved out
6 of the theater and the other was, as you've already heard the
7 testimony of and seen the documentation was to provide him the proper
8 mental health care he required.

9 Now, Your Honor, the time frame -- or continuing 11 July to
10 17 September, on 5 August, the defense notified trial counsel that
11 the accused would not divulge information during the 706 board. On 5
12 August. On 26 August, with the new defense counsel, we were notified
13 that he would divulge classified information and it would be at the
14 TS-SCI level. So, with that notification, Your Honor, the government
15 need to figure out to what extent clearances need to be provided.
16 "SCI" means Sensitive Compartmented Information. What compartments
17 needed to be read onto? I mean, this is a need to know basis and the
18 government had no working knowledge of what it was. So, what ensued,
19 Your Honor, is the development of this preliminary classification
20 review that was modeled, ultimately, after defense provided input
21 after an R.C.M. 706. As the Court has already seen in the enclosure,
22 Enclosure 42, it was ultimate questions were presented to the defense
23 experts and they just needed to answer with very generic answers.

1 So, the superseding order was ordered on 22 September 2010. On 21
2 October -- between 21 October and 1 November, defense submitted a
3 request for discovery in order to aid their security experts in
4 conducting this review and on 19 November excuse me, Your Honor. On
5 19 November, the trial counsel emailed the defense what portions of
6 what they asked for which were security classification guides in
7 order to properly review the material. On 13 December, the defense
8 security experts finished their review. And, again, one of the main
9 purposes of this preliminary classification review is to determine
10 what the highest level clearance likely needed and access for all
11 participants. On 13 December that concluded.

12 Now, Your Honor, for the R.C.M. 706 board from 13 December
13 until the completion, 22 April, between 13 December and 3 February,
14 the trial counsel worked to obtain TS-SCI clearances and read-ons for
15 the entire prosecution team, defense team, R.C.M. 706 board, and the
16 Article 32 officer. The Court heard testimony from Colonel Coffman
17 about how expensive and how long this process typically is, but with
18 the security -- defense security results, the prosecution was able to
19 use that with concurrence from the United States Army G2 in order to
20 expedite this process almost as fast as it could possibly occur to
21 get everyone the clearances. Also note, Your Honor, between 13
22 December 2010 and 3 February unfortunately, we don't have a cite for
23 this and will provide it after this, the R.C.M. 706 board was not set

1 because they were changing the members based off of clearances and
2 availability from the original members that were determined in late
3 August/early September. So, it wasn't until 13 December excuse me,
4 around 13 January 2010 -- 2011 that the board finally figured out
5 which three members because, again, defense requested three
6 specialized members and that's when they figured out who would be
7 available for the next few months and to have the requisite
8 clearances or didn't and we could process them and that was done by 3
9 February.

10 Your Honor, on 7 February 2011, defense notified the board
11 that it views the suspense of 4 weeks aspirational and that the board
12 should feel free to take the time necessary to conduct a thorough and
13 complete examination of the accused and that, undoubtedly, any
14 request for extension of time by the board would be granted; pinpoint
15 cite provided to the email from the defense. On 11 February, the
16 board notified the trial counsel and the defense that it planned to
17 begin its testing, medical testing and its interview of the accused
18 on 16 February 2011. Your Honor, on 15 February 2011, the defense
19 requested to meet with the accused before the R.C.M. 706 board
20 interviewed him. Now, as the Court's already heard testimony on and
21 the documentation and, most importantly in the trial counsel's
22 declaration that has been submitted to the board and defense what was
23 occurring at this time was securing a SCIF -- an SCI Facility in

1 order to have this interview. One had already been found prior to
2 the new year, but defense objected to using that facility that was
3 used for the PCRO for the purposes of the R.C.M. 706 and client
4 meetings. So then, the prosecution had to find another facility and
5 that's what was occurring simultaneously, Your Honor; all
6 simultaneous. So, on 15 February the defense made that request. On
7 5 March 2011, a Saturday, defense requested to meet with the accused
8 on 11 March 2011. On 5 March, the defense suggested, in the
9 defense's own email, that he meet the accused on Saturday on a
10 Saturday to accommodate the safety and transportation concerns of the
11 command. And those concerns, of course, for Saturday is that Private
12 First Class Manning is not being brought through a facility in
13 shackles facing potential humiliation and public scrutiny which would
14 be an Article 13 violation, and, generally, safety concern as you've
15 already heard testimony from Quantico officials and Colonel Coffman
16 and the members the company commander and first sergeant. So, Your
17 Honor, on 5 March 2011, a Saturday, defense made the request for 11
18 March. On it 7 March 2011, the following Monday, the defense
19 requested to meet with the accused on 25-26 March because of the
20 increasing cost of transportation. So, earlier that day, the
21 prosecution on that Monday, the next duty day because they had to
22 coordinate this, the prosecution finally got back to the defense, but
23 later in the day, saying that that date could or couldn't work and

1 then defense said, "It's too late, I need to move it." So, that
2 moved the entire 706 interview past 25 to 26 March. Your Honor, on
3 26 March 2011, the accused met with defense counsel at a SCIF for the
4 pre-706 meeting and then on 9 April 2011, again, a Saturday, the 706
5 board interviewed the accused in a similar facility. Finally, on 22
6 April, the board concluded its findings.

7 So, Your Honor, just to recap, there was defense ultimate
8 request for the R.C.M. 706, both in Iraq, two times after Private
9 First Class Manning was transferred to U.S. Army MDW searched for a
10 facility and board members, has been provided that detailed
11 explanation in the prosecution's affidavit, preliminary
12 classification review was conducted, security clearances for the
13 board members was expedited, and the R.C.M. 706 board actually was
14 executed and completed.

15 Now, Your Honor, security measures ----

16 CDC[MR. COOMBS]: Your Honor, if we could take a brief comfort
17 break?

18 MJ: Okay, that sounds like a good time.

19 TC[MAJ FEIN]: Actually, Your Honor, if we could maybe do a 30-
20 minute lunch break?

21 MJ: Any objection to that?

22 CDC[MR. COOMBS]: Yes, Your Honor, we won't be able to
23 coordinate food for our client in 30 minutes.

1 MJ: All right. Let's do this: let's -- we're going to take a
2 late lunch today. We'll get through the government's argument, take
3 lunch at that time, and well, we'll take lunch at that time and then
4 decide how we're going to proceed. How about that? Does that work
5 for both sides?

6 TC[MAJ FEIN]: It does, Your Honor, just so we can keep pushing
7 forward, Your Honor. The government has, actually, catered -- not
8 catered, but mess-hall food for all the military staff, so that issue
9 should be resolved.

10 MJ: All right. How long are they going to be here?

11 TC[MAJ FEIN]: I will find out, Your Honor.

12 MJ: 10 minutes now is okay?

13 CDC[MR. COOMBS]: Yes, Your Honor.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: All right. Court is in recess until 25 after 12.

16 [The Article 39(a) session recessed at 1213, 16 January 2013.]

17 [The Article 39(a) session was called to order at 1228, 16 January
18 2013.]

19 MJ: This Article 39(a) session is called to order. Let the
20 record reflect that all parties present when the court last recessed
21 are again present in court. Major Fein, are there any logistical
22 challenges to us continuing through to the end of your argument?

23 TC[MAJ FEIN]: No, ma'am.

1 MJ: Proceed.

2 TC[MAJ FEIN]: Ma'am, we left off starting to talk about
3 security measures. Your Honor, they're 22 protective orders, the
4 preliminary classification review, we've already talked about and
5 security clearances for many different individuals are involved in
6 this case, another factor contributing to it being a complex case.

7 Specifically, something to highlight, on 2 September 2010,
8 that is when the defense first requested security clearances for the
9 defense team and access to classified information for the accused.

10 Between 17 September and 13 December 2010, that's when the
11 preliminary classification review occurred. On 31 January 2011, as
12 evidenced in the emails, trial counsel notified defense that the 706
13 board's members had all been read on to the required compartments and
14 provided an update on defense counsel's security clearance statuses.

15 And on 3 February 2011, Mr. Coombs was actually read on and the
16 prosecution assisted with coordinating having it done in
17 Charlottesville to expedite his read-on because he was there, not in
18 Rhode Island. On 22 June 2011, the Special Court-Martial Convening
19 Authority issued protective orders for both law enforcement-sensitive
20 material and the Secretary of the Army's 15-6 investigation to be
21 disclosed to the defense and between May and August 2011, there's 18
22 different federal protective orders entered that the Court has
23 already had as an appellate exhibit in this case.

1 Your Honor, the point of these next two slides, really, is
2 just to show that defense submitted multiple requests for experts or
3 funding for experts that ultimately all -- except for the two that
4 were denied -- that resulted in some kind of security measure being
5 taken. One for the computer forensic experts, it was providing the
6 right hardware and software so the forensic experts can do what they
7 normally do, but do it on a classified system and the government, of
8 course, paid for that so the civilian experts would not have to pay
9 out of pocket because of the security sensitive nature of this
10 material.

11 Now, Your Honor, classification reviews and approval to
12 disclose evidence in discovery, again, this is the 50,000-foot chart.
13 Trial counsel in Iraq started beginning coordination, four more
14 requests for this went out in the March and April timeframe. Charged
15 documents in evidence was excuse me, they were disclosed in November
16 2011 and this is an on-going -- some of these security measures --
17 classification reviews and approvals, OPLAN B, motions practice, even
18 discovery, and investigation -- that's all I'm going, today -- later.

19 So, Your Honor, I'd first like to talk about classification
20 reviews then the approval to disclose classified evidence and
21 discovery. First, classification reviews. Your Honor, on 28 July
22 2010, the trial counsel at MDW, once the case was transferred, began
23 coordinating with DoD for classification reviews, understanding at

1 the time what evidence would likely be used at trial. Although, as
2 previously stated, the investigation was still on-going.

3 MJ: And this was based on the original charges?

4 TC[MAJ FEIN]: This was based off of the original charges and
5 what they -- what the -- as of 5 July 2010, the prosecution, the
6 command, and Army CID and just that approximately 30 days could
7 quickly figure out, from an initial scrub of all the -- of the few
8 devices that were collected in in Iraq. That doesn't include, of
9 course, the majority of the evidence which is outlined in all of the
10 forensic reports such as the CENTCOM servers, the SD card, Intelink
11 logs, et cetera.

12 On 10 August 2010, trial counsel began communicating with
13 Department of State about classification reviews. Now, this original
14 communication, of course, was know Private First Class Manning had
15 admitted to disclosing State Department cables. One cable, which is
16 its own charge, the Reykjavik cable, has already been disclosed and
17 there was evidence well, he -- there was an admission and it was
18 released by WikiLeaks, but not necessarily the forensics by that
19 time, so the prosecution did start working with the Department of
20 State and others to figure out the process. That's what's happening
21 in this fall time frame and that's what the declarations from the
22 OCAs and the trial counsel outlined. You even heard testimony from
23 Mr. Haggett that doing classification reviews for criminal process,

1 either federal or military, is not a standing procedure; it's not a
2 standing committee that does this. Organizations including DoD and
3 DIA, Department of State, have FOIA. That is, I think, explained
4 probably in too much detail by the Department of State in their
5 response to the prosecution and defense, but FOIA focuses on
6 declassification, not classification.

7 So these organizations -- the prosecution was meeting with
8 them in order to understand how to process this, especially
9 considering the volume and real-time nature of the disclosures that
10 were on-going at that time, and then balancing that, of course, with
11 the mitigation effects going in play that's outlined in the different
12 classification reviews that have been provided to the defense.

13 6 October 2010, trial counsel begin coordinating with an
14 OGA about classification review. Early November 2010, trial counsel
15 requested Department of State do an initial sort of the purported
16 cables to determine which ones, if any, were classified. Again, this
17 was for the initial charge sheet and for a potential additional
18 charge sheet if there were going to be charges preferred. And, note,
19 Your Honor, that's the same time the first disclosure of Department
20 of State cables from when the database was stolen -- at least what
21 the government's arguing on the charge sheet -- the accused stole the
22 database and transmitted it to WikiLeaks -- didn't occur until 28
23 November 2010. So, this coordination was happening before that even

1 occurred. And then once that occurred, that, of course, changed the
2 way the Department of State and the prosecution and law enforcement
3 had to -- needed to view the information.

4 MJ: What happened on 28 November 2010?

5 TC[MAJ FEIN]: That's the very first releases, Your Honor, of
6 the State Department -- reported State Department cables that Private
7 First Class Manning stole -- or at least has been charged with
8 stealing -- from the Net-Centric Diplomacy database. The reason I'm
9 highlighting that -- the difference is he has also been charged with
10 one individual cable at a different time, the Reykjavik cable. So,
11 this is the other charge under 1030 and 641.

12 So, continuing on classification reviews, again, at the
13 10,000-foot level, Your Honor, early December 2010, trial counsel
14 requested the Department of State conduct an informal classification
15 review to understand what a full and formal review would require,
16 based off the volume as they were being released. With the
17 prosecution and commands needed to figure out is what's an
18 appropriate amount to account for the offense that was actually
19 committed and how many would be reasonable to expect to have a
20 classification review done. What I mean, Your Honor, is what's on
21 the charge sheet is more than 200,000 cables stolen, but only more
22 than 75 transmitted. So, there had to be a number between what could
23 be proven under 1030 knowing the amount of witnesses, knowing that

1 classification review had to occur for that offense and that needed
2 to be figured out. And the prosecution and law enforcement is not
3 suited to do that. We provide input, but it is not our equity to
4 determine and Department of State had to approve. And that started
5 happening in early December 2010.

6 Your Honor, 1 March 2011, the additional charges were
7 preferred. On 9 March 2011, trial counsel began coordinating with
8 INSCOM about their classification review of one of the charged
9 documents. On 18 March 2011, evidenced by all the different memos
10 that have been brought into the Court, that's when the trial counsel
11 -- we formally submitted memoranda capturing these different meetings
12 and requests to do these classification reviews to actually start
13 holding individuals and organizations accountable through
14 documentation. And so, that's why the word "finalized" was used.
15 Coordination had already been started, but that's now to start the
16 formal process.

17 MJ: So the coordination with these eight entities before 18
18 March 2011, where will I find that?

19 TC[MAJ FEIN]: Your Honor, you'll find that in two major
20 locations. It's in the OCA declarations or, excuse me, the trial
21 counsel's declarations, OCA responses to defense questions and you'll
22 also find it in the prosecutions declaration on what we did or did
23 not do at the time. And, actually, a third location, Your Honor, is

1 Enclosure 1, different emails between us and those agencies that we
2 have provided to the court.

3 MJ: Okay.

4 TC[MAJ FEIN]: Sir, excuse me, Your Honor, ma'am, 28 July 2011,
5 the trial counsel submitted updated requests for classification
6 reviews to the major entities. 7 September 2011, similar requests--
7 written requests to -and as the Court has seen and defense has asked
8 the different OCAs, the prosecution even included speedy trial
9 language so they understood the prosecution's obligation on behalf of
10 the government to reasonably move -- to have reasonable diligence and
11 move this case forward.

12 Your Honor, now, just to highlight from some of the OCA
13 responses, here's from INSCOM: "Trial counsel repeatedly
14 communicated either directly or indirectly with INSCOM on numerous
15 occasions during this time." Of course, these are snapshots. "Trial
16 counsel has routinely communicated with representatives at INSCOM
17 throughout the entire matter. Trial counsel needed the reviews
18 completed as quickly as practical," you had in their responses.

19 On 6 October 2011, Your Honor, trial counsel submitted an
20 updated request for classification reviews to those we had not
21 received. On 13 October 2011, trial counsel submitted updated
22 requests for classification review to ODNI. Now, just to alleviate
23 any confusion, the ODNI was providing classification review on intel-

1 link logs. That is supporting evidence, but not a charged document,
2 so that did play a different role and the trial counsel requiring
3 that or at least briefing the -- our legal analysis to the convening
4 authority of whether that was required prior to the 32 or not and our
5 analysis was that it was not. The only reason we needed the
6 declaration was in order, under R.C.M. 806, to close, if needed, the
7 hearing under Article 32 because we needed something to show the
8 national security interest involved; that's why we were asking for
9 that. The other reason is those logs are very extensive and,
10 frankly, the parties needed to know what and was not classified, but
11 it was not a charged document. Private First Class Manning was not
12 charged with compromising it to audit data.

13 MJ: Let me ask you a question, here, just going through these
14 classification reviews. I believe in the defense brief or somewhere
15 the assertion is that you could have gone to the Article 32 without
16 classification reviews of the charged -- the *res* of the charged
17 offenses.

18 TC[MAJ FEIN]: Yes, ma'am. So, a few points to answer that,
19 Your Honor. First and foremost, the charge sheet, itself, has the
20 word "classified" on it which requires the prosecution to prove the
21 material is or is not classified. So, to go to the Article 32, we
22 would have to provide evidence to the Article 32 officer that the
23 information was or was not classified.

1 MJ: Why couldn't you do that with just the marking on the
2 documents?

3 TC[MAJ FEIN]: Well, Your Honor, the markings on the I mean
4 frankly, Your Honor, the defense has asked the Court to take judicial
5 notice of over classification. The two don't balance with each
6 other. This is a legal proceeding -- a criminal, legal proceeding
7 that has the highest standards of proof. The prosecution isn't going
8 to go forward and the command -- Colonel Coffman even testified, he
9 was not going to have a court-martial of these charges if the
10 information was not, in fact, classified. Even the reference --
11 legal references, although very few, on how to prosecute a classified
12 court-martial a case for the prosecution and defense that the Navy's
13 Code 30, Code 17 publication even states that you need to have
14 clarity if something is classified or not before you move forward.
15 Now, Your Honor, just as an aside, typically, unless a Soldier is in
16 pretrial confinement, classification reviews are going to occur --
17 should occur prior to preferral so there will be no delay. But that
18 wasn't even an option in this case as the Court has already seen
19 under the investigation portion, this moved so fast because it was an
20 on-going threat and an on-going issue. The crime was not even
21 completed when -- well, the crimes, as charged, were completed when
22 Private First Class Manning was placed under arrest, but the on-going
23 releases and effects were -- are still on-going. So, with all that

1 being said, the classification reviews could not have occurred ahead
2 of time. The prosecution had to prove the information was classified
3 so the only way to legally, competently prove is to have an OCA, an
4 Original Classification Authority, say it is or it is not. And the
5 best example of this, Your Honor, the best example is the Apache
6 video. That Apache video was originally thought to be classified and
7 after it went through the classification process, it was determined
8 to not be classified which is why the additional charge sheet, 1
9 March 2011, this prosecution and the command that preferred charges,
10 did not allege it being classified because we had definitive proof
11 from an OCA it was not.

12 So, the defense also argues that there could have been an
13 alternative or substitute that could have been used other than just
14 the mere markings. You heard testimony from Mr. Haggett that, in
15 order to do alternatives or substitutions, the classification review
16 would still need to be completed because the entity would have to
17 understand why something is classified. Now, whether it is
18 memorialized in a 4 to 1000-page document or I think 64 pages from
19 the Department of State -- not necessarily a requirement, but that
20 was the easiest requirement in order for all parties to understand
21 and it was much more efficient because that was occurring anyways,
22 the writing to explain why something was classified or not. But the
23 process of the classification review still had to occur until that

1 last moment when we received it or a witness could have testified.
2 But that would happen at the same time because that witness who is
3 testifying is the OCA; he's the one who signed the document.

4 Your Honor, I'm going to jump through these -- it's
5 provided to the Court already and, of course it's in the -- but other
6 comments from the OCAs or their delegates that are provided in the
7 declarations about trial counsel's interaction with the
8 organizations. And, just to alleviate any other -- well, to provide
9 some clarity, the DoD entities, originally, were coordinated through
10 OTJAG, that's outlined in both the prosecutions declaration, it's
11 outlined in our motion, it's outlined even in the OCA declarations or
12 answers to their questions. And then, at some point, the prosecution
13 stepped in and started doing direct coordination in order to ensure
14 it was getting done. But that, of course, was a way to have, not
15 necessarily a delegation, but multiple organizations moving these
16 issues simultaneously.

17 Now, Your Honor, moving on to approvals from discovery --
18 or disclosure of evidence and discovery. A few highlight, Your
19 Honor. On 26 February 2011, trial counsel coordinated a meeting to
20 discuss the next steps for receiving their approvals to disclose
21 classified information with OCAs. That was right before Charge --
22 the additional charges because once the additional charges -- because
23 once the additional charges were sworn out, then we'd have to,

1 ultimately, under 701(a)(1), provide the documentation that
2 accompanies the charges, 701(a)(2), other discovery, and then just
3 affirmative discovery, of course, our evidence.

4 1 March, the charges were preferred; 14 March, trial
5 counsel submitted written request for approval to disclose classified
6 information; that's why on 14 March that occurred because it happened
7 after the charge. We coordinated with the different organizations
8 and started working on that. 15 March, trial counsel requests we
9 review the SECARMY 15-6 that was completed by the IO on 14 February.
10 Once we were informed it was completed, we asked to review it as soon
11 as possible. In April 2011, trial counsel learned an unclassified
12 CID case file, the actual -- so here, Your Honor, the Army CID has
13 already heard forensic reports -- well, Army CID has their normal
14 investigative file; this is what is typical in every other case that
15 doesn't deal with forensics. And their file had a classified and
16 unclassified side. All the AIRS. 997 documents at the time were in
17 the unclassified case file and, after we were reviewing them with
18 other organizations, it was pointed that material in there could be
19 classified. So, in April, that's when the prosecution learned of
20 that; that's captured in the prosecution's declaration.

21 Between April and June 2011, Your Honor, the Army G2 Office
22 reviewed approximately 900 pages excuse me, Your Honor, over 900
23 documents of the CID case file for any equity holders for classified

1 information. And then, as you can see from the timeline, and
2 ultimately in our declaration, that information was pushed through
3 all the way to well, it was triaged out as being classified on 17
4 September 2011, the equity holders approved us disclosing those
5 remaining documents to the defense. So, yes, Your Honor.

6 MJ: Now, are these all the documents you're talking about,
7 again, that refer to the res -- the offense -- the government's case?
8 What, if anything, was being done with the documents the defense was
9 requesting?

10 TC[MAJ FEIN]: You mean in their discovery request, Your Honor?

11 MJ: Yes.

12 TC[MAJ FEIN]: Well, Your Honor, the discovery requests, as we
13 were receiving them, we processed them, and, if we have that
14 information or we were seeking the information, we sought to answer
15 it unless the government's response to the defense was, "It was an
16 inadequate request, no legal basis, no authority," whatever it was,
17 that was being provided to the defense.

18 MJ: I guess the "no authority" piece is where I'm confused.

19 What does that mean?

20 TC[MAJ FEIN]: Well, Your Honor ----

21 MJ: That was the government's position when I first came on
22 board.

1 TC[MAJ FEIN]: Yes, ma'am. So, first off, the defense was
2 asking for material back that the prosecution's position, at the time
3 well, not at the time, it would still be today, but at the time
4 meaning pre-referral, pre-Article 32, the defense was not entitled to
5 because there was no legal authority to provide the information. The
6 super majority of the information was outside the possession,
7 custody, or control of the prosecution. Frankly, it just wasn't --
8 either the prosecution wasn't aware of it, or became aware of it, if
9 it even existed, from the defense's request, or knew about it but had
10 no authority to get it as prosecutors. I mean, the key to discovery,
11 Your Honor, either fortunately or unfortunately, in our system is
12 referral; that's when the formal discovery obligations start. Now,
13 there is R.C.M. 405 discovery obligations for an Article 32, but the
14 formal obligation starts at referral. And when we're dealing with
15 the amount of classified information with different government
16 organizations outside of DoD, they are not -- without a formal
17 obligation, they're not going to be disclosing material. But, what
18 was allowed, and what we've already discussed, Your Honor, the
19 prudential search requests preservation. The prosecution was getting
20 ahead of preserving all that material which was much broader than the
21 defense is requests. So, if the Court later rules, "Yes, this
22 material or says it is relevant," as we went through that litigation
23 but, actually, most of that litigation wasn't based off of this

1 request; it was refined requests for the Court. When that litigation
2 happened, the material was there. It wasn't missing. It was
3 preserved. The prosecution searched it and disclosed it; same with
4 the Department of Defense, DIA, and all the others.

5 MJ: Okay. Proceed.

6 TC[MAJ FEIN]: So, Your Honor, on 17 September 2011, equity
7 holders approved disclosure, so this information, Your Honor, is the
8 approximately 30 documents from the CID case file, the original file,
9 out of 997 that were deemed classified. The prosecution, once we
10 received approval that the information is unclassified over the
11 summer, disclosed the material immediately once we had received the
12 confirmation it wasn't classified. It's only those remaining
13 documents that were; that was on 17 September.

14 Your Honor, on 4 October 2011, CID approved release of the
15 present reports after confirming nothing was classified, pursuant to
16 the CID's original classification authority. On 26 October, we --
17 the prosecution, between 4 and 26 October, processed all of their
18 reports and on 26 October sent it up to DoD for authority to disclose
19 it because it was classified. This is outlined in more detail in the
20 prosecution's responses to defense questions. On 27 October 2011,
21 trial counsel received properly marked documents originating from the
22 unclassified CID case files from those equity holders I just spoke
23 about on 17 September. On 28 October, all OCAs approved disclosure

1 of the 22 forensic reports consisting of the classified information
2 from their organizations; the final approvals came in. And then, on
3 4 November, the trial counsel produced the entire CID -- or all CID
4 forensic reports and on 8 November, trial counsel produced the
5 classified information contained within the CID case file. And,
6 what's not noted here, included with that is the forensic evidence
7 for the defense forensic experts to start reviewing; that 8 terabytes
8 of information is for them to start analyzing. Now, I note, Your
9 Honor, there is no coincidence that this was turned over on 4
10 November right after we got the approvals. Once we received the
11 approvals, 8 November, we produced classified information from the
12 CID case file. Also on 8 November was the briefing about the entire
13 prosecution's case, including all this evidence and what it means;
14 330,000 pages, 22 forensic reports, the prosecution outlined all of
15 it for the defense on that same day, 8 November.

16 Approval to disclose evidence and discovery continued, Your
17 Honor. Only two points to highlight here is the continuing
18 obligation, it still is on-going; we discussed that earlier on the
19 record with the 22 February and 22 April notices all the way through
20 trial in case something else comes up. So, Your Honor, similarly to
21 before, effort to expedite the approval process the trial counsel
22 requests for approval to disclose classified information to the
23 defense of the original ones back in March and every subsequent one

1 also included any derivative use such as law enforcement
2 investigations. What that allowed the prosecution to do is front-
3 load approvals so once the last approval for the series of documents
4 in evidence was obtained, it all could be disclosed with no further
5 requirements. The alternative, Your Honor, would be is to wait to
6 receive the final CID forensic reports and then submit all of that
7 and its evidence to all the equity holders to have them all approve
8 it which would have been 6 more months. So, all that was done up
9 front in order to expedite this. So that's a good example, Your
10 Honor, of the trial counsel in this case working simultaneously with
11 evidence equity holders, owners of the evidence, owners of the
12 information, CID and other law enforcement and DoD to approve the CID
13 reports, all simultaneously over that time that culminated at 28
14 October and 4 November.

15 Now, Your Honor, OPLAN B at the 50,000/10,000-foot level,
16 OPLAN B planning process began in May 2011. The actual order was
17 signed in June of 2011 and then the Article 32 was restarted--ordered
18 on 16 November and it was restarted on 16 December. The keys to
19 OPLAN B, Your Honor, and you heard from testimony from Colonel
20 Coffman and you have the actual order and the defense does, is that
21 Colonel Coffman was not equipped as the Special Court-Martial
22 Convening Authority to hold an Article 32 of this caliber. The
23 United States would argue no Special Court-Martial Convening

1 Authority in the United States Army is equipped to do this, let
2 alone, likely, any General Court-Martial Convening Authority, would
3 be equipped to hold this type of trial or, at the time, Article 32.
4 And that's based off of media attention, the public's involvement and
5 security concerns both for information security and physical
6 security. So, Phase 1, Your Honor, of our OPLAN B and this is where
7 I think the testimony was a little unclear based off the different
8 questions from the court, defense, and prosecution is that OPLAN B
9 started in June of 2011 and is continuing through today and tomorrow.
10 It is only the phase that was executed for the Article 32 that was
11 based off Colonel Coffman's order that pulled that trigger. So, what
12 happened before that point, Your Honor, in November -- before
13 November 16th, is concept of operations began 11 May, bi-weekly
14 operation planning group teleconferences between Headquarters, DA,
15 Fort Leavenworth, United States Army MDW, and Colonel Coffman's
16 command focused on security, travel, public affairs, contracting, IT
17 support although it's debatable whether that still is occurring
18 installation management organizations across three different
19 installations. Only when Colonel Coffman ordered OP -- ordered the
20 32, did that start Phase 2 through 5 execution. So, the front-
21 loading, Your Honor, the coordination up front, allowed the
22 infrastructure and the resources to be implemented within 30 days.
23 Otherwise, it would have taken, again, months in order to get the

1 infrastructure, the Army contracting and everything else expedited.
2 All that was expedited ahead of time and just needed time to actually
3 set up. And Phase 5, in the original branch plans, Your Honor, that
4 includes the trial that's still on-going -- or shall today, for the
5 military service members. So, again, efforts to expedite the overall
6 trial process, Your Honor, in OPLAN B started in May 2011 and it was
7 basically -- it was based on having the right resources in place.

8 Now, Your Honor, motions practice. This is, I think, quite
9 easy for the record because the record is so great in size this
10 started, of course, at referral and, just as a summary, over 450
11 appellate exhibits, eight Article 39(a) session, which as of, I
12 think, today, 37th day in motions practice actually before the court.
13 More than 30,000 pages have been used in motions practice,
14 unclassified and classified, between the filings, the enclosures at
15 organizations that the Court has had to review, 27 different
16 witnesses and more than 8 ----

17 MJ: How many pages did you say?

18 TC[MAJ FEIN]: More than 30,000, Your Honor. So, that's not
19 just including what's before you know, what's actually in the court
20 reporter's boxes and what would be in the record -- well, it will all
21 be in the record of trial, but that also includes that other
22 organization's more than 80 hours of testimony.

1 Finally, Your Honor, the last category to discuss is
2 defense's alleged periods of in activity under Article 10. These are
3 all the different periods; I'm going to go through each one briefly,
4 Your Honor, very briefly.

5 Your Honor, the first, 31 May 2010 to 5 July 2010, just a
6 few to highlight, Your Honor. Again, this is only a -- I would say -
7 - I've been using 50,000 and 10,000-foot, Your Honor; this is about a
8 1,000-foot view of fact. We had to fit them all on one slide, chose
9 to make it only this, but the record, I think, is replete with
10 examples here. So, Your Honor, June 2010, trial counsel begin
11 meeting with diplomatic security services. 30 June 2010, trial
12 counsel contacted USF-I SJA to discuss the plan for moving Private
13 First Class Manning to a long-term facility. 5 July, the original
14 charges were preferred. Inherent, Your Honor, or implied, Your
15 Honor, if charges are preferred on 5 July, there is activity from the
16 trial counsel in Iraq in order to put a chart sheet together, in
17 order to have an initial investigation, and in order to brief
18 commanders up to the level of probable cause of what did or did not
19 occur at that time, based off the facts known.

20 The next period of time, Your Honor, 11-15 July, trial
21 counsel requested assistance in locating an actual provider for the
22 R.C.M. 706 in Iraq. Mid-July, trial counsel met with DoJ and CID to
23 discuss the way for that to actually happen in Iraq. And then they

1 met CID and other law enforcement organizations in Germany during
2 that time and that's provided in a memorandum from the Iraq trial
3 counsel. 28 July 2010, trial counsel requested assistance from DoD
4 for classification reviews.

5 The next period of -- alleged period of inactivity, Your
6 Honor, now jumping to Spring of 2011. 23 April 2011, trial counsel
7 notified defense it was identifying a neuropsychologist in the
8 vicinity of Fort Leavenworth, based off of the defense's request for
9 that. 2 May, trial counsel requested authority to disclose the
10 SECARMY 15-6 to the defense. 5 May, trial counsel had a phone
11 meeting with the defense to discuss progress and updates. 9 May,
12 meeting with DoD to discuss their prudential search request to
13 explain what we needed done and how they -- we recommended they do
14 it. 12 May, discovery productions occurred; the USF-I 15-6,
15 specifically. And then in -- during this time, Your Honor, 23 emails
16 occurred between prosecution and defense including 2 emails with the
17 Article 32 IO, himself, spanning 14 duty days. And that's the range,
18 Your Honor, there; emails number 494 through 517 at the bottom.

19 The next period of -- alleged period of inactivity, I
20 apologize for all the bullets, Your Honor, but, again, just highlight
21 four. 16 May 2011, correspondence with defense relating to newly
22 assigned counsel.

23 MJ: For the prosecution or the defense?

1 TC[MAJ FEIN]: The -- for the defense, Your Honor. 25 May,
2 trial counsel submitted a prudential search request to multiple
3 organizations. 3 June, trial counsel contact Department of State for
4 an update of the classification review. The discovery production --
5 and then, during this time, Your Honor, 43 different defense emails
6 including 5 emails with the Article 32 IO, spanning 24 duty days.
7 The defense has alleged a period of inactivity of the prosecution.

8 Your Honor, our next period -- or alleged period, to
9 highlight a few. 22 June, trial counsel provided defense two
10 protective orders for unclassified information and discovery and
11 provided updates on their paralegal support. 23 June, trial counsel
12 requested authority from FBI, DoD, and DIA and OGA to disclose
13 information and discovery production of over 8,000 pages occurred
14 during this time and then 44 defense emails including three with the
15 Article 32 IO spanning only 10 duty days. So, upwards of 44 emails
16 over 10 days.

17 Your Honor, the next period, 18 July, trial counsel
18 responded to defense inquiries regarding the multiple protective
19 orders to explain issues they have. 21 July, again, the prudential
20 search request, the prosecution actually reviewed the draft tasking
21 letter from DoD before it went out to make sure it was accurate from
22 what we were requesting. 25 July and that's captured in the
23 Enclosure 1, Your Honor, in the email, Email Number 553. 25 July, a

1 discovery production of 3,000 pages during this alleged apparent
2 activity. And then 40 defense emails spanning 15 duty days.

3 Next, Your Honor, trial counsel submitted, on 28 July,
4 updated requests for classification reviews. 1 August, trial counsel
5 notified defense of additional classified information found on the
6 accused's personal computer as of 1 August 2011. 4 and 9 August
7 2011, the trial counsel requests to disclose charged documents and
8 defense submitted an expert request and there was a discovery
9 production of 6,000 pages during this time. Now, Your Honor, just to
10 highlight, when the prosecution is producing discovery, there's a
11 process that goes in -- that's involved. So, implied there is
12 there's work going on in the days preceding 6,000 pages being
13 produced; it's not just a one-day process. 15 August, trial counsel
14 requests approval to disclose the entire FBI case file where he
15 discussed how, after that, we received a copy for *Brady* purposes. 22
16 August, trial counsel updated defense on multiple issues including
17 their security experts and travel. And then, during this period of
18 time, Your Honor, 24 duty days, there was 167 emails between the
19 defense and prosecution related to this case, including two emails
20 with the Article 32 IO.

21 Your Honor, the next period of time, 31 August 2011, trial
22 counsel responded to the defense's concerns regarding experts,
23 another discovery production on 1 September 2011 of 400 pages. On

1 19 September, another discovery production of 77 pages. And then on
2 21 September 2011, that's when defense submitted their preservation
3 request and the court's already seen in the previous timelines on the
4 prosecution processing that within a week and a half and working with
5 down range and other organizations to actually answer those --that
6 request. And, during this period of time, Your Honor, 61 emails
7 including two with the IO -- Article 32 IO.

8 Your Honor, 29 September to 27 October, the next period, on
9 the very first -- the second day of this period, defense requested
10 supplies from the prosecution, the prosecution provided the supplies.
11 3 October, approximately 12,000 pages produced in discovery and
12 that's also when the prosecution received the final reports. Your
13 Honor, on 6 October 2011, trial counsel explained to the defense that
14 the purpose of the presentation to the defense of its case in chief
15 was to "Orient you to the facts of the case, layout of the report,"
16 so it was the forensic report, "and give a brief overview of the
17 prosecution's case" to "speed up the pretrial process and minimize
18 any future delays." That was the whole purpose of what we offered
19 and then the defense asked for it twice.

20 MJ: Talk to me about the one above that, that you requested the
21 damage assessment. Was that in response to what the defense asked
22 for or was that something you initiated yourself? I thought you told

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.

c. Record of proceedings in court, including Article 39(a) sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.